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OPINION ON REHEARING

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RONELL FREDERICK BOLDEN et al.,

Defendants and Appellants.

D074574

(Super. Ct. No. FVI 1302535)

APPEALS from judgments of the Superior Court of San Bernardino County,  
Debra Harris, Judge. Judgments affirmed.

Eric S. Multhaup, under appointment by the Court of Appeal, for Defendant and  
Appellant Ronell Frederick Bolden.

Werksman Jackson Hathaway & Quinn, Mark J. Werksman and Kelly C. Quinn  
for Defendant and Appellant Valerie Wildman.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

Separate juries convicted Ronell Frederick Bolden and Valerie Wildman of first degree murder (Pen. Code § 187, subd. (a))<sup>1</sup> (count 1); attempted robbery (§§ 664, 211) (count 2); and two counts of robbery (§ 211) (counts 5 and 6). The crimes were committed in the early morning hours of October 7, 2012. The victim of the attempted robbery and murder was Duane M.

The People initially filed a complaint that also charged LaShawn Hay (Bolden's mother) and Phillip Peterson (Bolden's cousin and Hay's nephew) with the murder and attempted robbery. A later-filed information charged Peterson, but not Hay, with counts 1, 2, 5, and 6, and charged Hay with one count of accessory after the fact (count 4). Both Peterson and Hay entered into plea agreements and testified at trial.

Bolden's jury found three firearm enhancement allegations true as to each of counts 1 and 2 (§ 12022.53, subds. (b-d)), and one firearm enhancement allegation true as to each of counts 5 and 6 (§ 12022.53, subd. (b)). As to counts 5 and 6, the Bolden jury also found true the allegation that Bolden committed the robberies for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(1)). Bolden's jury was unable to reach a verdict on gang enhancement allegations as to counts 1 and 2. Consequently,

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

the court declared a mistrial as to those allegations and dismissed them as to Bolden on the People's motion.

Wildman's jury also found three firearm enhancement allegations true as to each of counts 1 and 2 (§ 12022.53, subds. (b-e)), and one firearm enhancement allegation true as to each of counts 5 and 6 (§ 12022.53, subd. (b)). As to all four counts, the Wildman jury found that Wildman committed the crimes for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(1)).

The court sentenced Bolden to a determinate prison term of 29 years four months and an indeterminate term of 50 years to life. The court sentenced Wildman to a determinate prison term of 26 years and an indeterminate term of 50 years to life.

Bolden and Wildman both appeal. Bolden contends: (1) the trial court prejudicially erred by excusing a juror without legally sufficient cause; (2) there was insufficient evidence to support the jury's gang enhancement findings; (3) the admission of gang evidence was prejudicial error; and (4) the court prejudicially erred by refusing to redact from accomplice Peterson's plea agreement Peterson's promise to testify truthfully.

Wildman contends: (1) there was insufficient evidence corroborating the testimony of accomplices Peterson and Hay to support any of her convictions or true findings on the gang enhancement allegations against her; (2) the prosecutor engaged in prejudicial misconduct by misstating the law regarding corroboration of accomplice testimony; (3) there was insufficient evidence to support the jury's gang enhancement findings; (4) the admission of gang evidence was prejudicial error; (5) the court prejudicially erred by instructing the jury with CALCRIM No. 372 regarding flight;

(6) the court prejudicially erred by instructing the jury with CALCRIM No. 332 regarding expert opinion evidence; (7) the court prejudicially erred by refusing to redact from Peterson's plea agreement his promise to testify truthfully; and (8) her trial counsel rendered ineffective assistance in stipulating to admit her second and third interviews with the police instead of seeking to exclude them as "fruit of the poisonous tree" of her first unlawful police interview. Bolden joins in Wildman's arguments.

In a petition for rehearing that we granted, Bolden asks that we remand the case to allow the trial court to consider the application of section 12022.53, subdivision (h), which became effective January 1, 2018, and gives the trial judge discretion whether to impose sentencing enhancements for firearms. Wildman joined in Bolden's petition for rehearing. We remand the matter to allow the trial court to exercise its discretion regarding the firearm enhancements, and otherwise affirm the judgments.

#### FACTS

Bolden and his mother Hay lived in Compton before they moved to Victorville. In Victorville, Bolden, Hay and Hay's boyfriend, Haze Harts lived together in an apartment. Hay and Wildman became friends after they met through Wildman's daughter, who lived in Hay's apartment complex. Wildman drove a black Ford Explorer.

On October 6, 2012, Bolden's and Peterson's grandmother hosted a barbecue in her backyard to celebrate Bolden's 21st birthday. The barbecue started around noon and ended between 10:00 p.m. and midnight. Bolden, Peterson, Hay, Harts, and Wildman all attended the barbecue.

At trial, Peterson testified that after the barbecue gathering ended, Wildman drove him, Bolden, and Hay to a nightclub called Teazers. Everyone in the group was drinking a lot at Teazers, and Wildman was paying for the drinks with cash. In the club, Wildman started talking to Bolden and Peterson about committing a robbery to get back the money she had spent on drinks. She urged Bolden and Peterson to commit a robbery at a nearby Denny's restaurant. When the group left Teazers, Wildman drove them to Denny's. Bolden rode in the front passenger seat, Peterson sat behind him, and Hay sat behind Wildman.

#### Robberies (Counts 5 and 6)

Peterson testified that when the group arrived at Denny's, Wildman saw people in the parking lot and said they "could get those people right there." Bolden and Peterson got out of the vehicle and Peterson saw Bolden take a black gun out of his waistband. They walked up to two men, Altus Dangerfield and Dion Washington—the robbery victims identified in counts 5 and 6. Bolden "had words" with the men, and Peterson took a cell phone from one of them and a chain from the other after frisking them. Peterson testified that he "heard gang stuff." Specifically, he thought he heard Bolden say, "Rolling 60 Crip." Bolden and Peterson then got back into Wildman's vehicle and Wildman drove away.

San Bernardino County Deputy Sheriff Zachary Fidler responded to the Denny's robberies in the early morning of October 7, 2012, and contacted Dangerfield.<sup>2</sup> Dangerfield told Fidler that a black Ford Explorer drove right up to where he was standing with his friends in the Denny's parking lot and two men exited the Explorer. Dangerfield described one of the men as "a light-complected black male adult, approximately 5' 6" to 5' 7" in height, very short and [stocky], weighing approximately 220 pounds to 240 pounds . . . ." Dangerfield described the other man as a "tall and skinny" adult black male with braided hair. One of the men exited the Explorer from the front passenger door and the other exited from the rear passenger door.

Dangerfield told Fidler that the short, stocky man pulled a black revolver from his waistband and pointed it at Dangerfield's group. He told the group he was a Nutty Blocc Crip and said, "[Y]'all know what this is." He then demanded the group "hand over their jewelry, their watches, and their necklaces." The other "tall and skinny individual "frisk[ed] the group for their property that the first subject demanded." Dangerfield told Fidler that he gave the taller man \$60 and his silver watch. The taller man then asked Dangerfield for the keys to the vehicle Dangerfield was standing in front of. Dangerfield told him that the owner of the vehicle had run from the scene. At that point "there was a commotion where everybody else started taking off running, at which point the two [perpetrators] got back into the black Ford Explorer and drove out of the parking lot."

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<sup>2</sup> At trial, Dangerfield was unwilling or unable to recount the events surrounding the robbery that he related to Fidler almost immediately after the robbery occurred. Consequently, the prosecution called Deputy Fidler to testify about Dangerfield's initial description of the robbery to impeach Dangerfield's trial testimony.

On October 15, 2012, San Bernardino County Sheriff Sergeant Joseph Janowicz interviewed Dangerfield about the robbery at Denny's. Dangerfield's description of the robbery largely matched his statements to Fidler shortly after the incident. He told Janowicz that the man holding what he described as a black, long-nosed revolver pointed the gun at Dangerfield's group and said, "You know what this is. Break yourself, nigga." At some point the man with the gun shouted out "Nutty Blocc." Dangerfield told Janowicz that the driver of the Explorer did not exit the vehicle but remained inside it for the entire duration of the incident.

At trial, robbery victim Washington testified that he was in the parking lot of Denny's in the early morning of October 7, 2012, with four friends. He saw a black SUV (sports utility vehicle) approach but he looked away from the vehicle and did not see anyone exit it. Two black males then approached his group and one of them was holding a gun. The man with the gun pointed it at the group and told them not to move. The other man went through everyone's pockets and took Washington's cellphone. The two men then got into a black SUV and drove away. Shortly after the incident, Washington told Fidler that the man with the gun was approximately 5 feet 7 inches tall and had a tattoo of a black teardrop under one of his eyes.

#### Attempted Robbery and Murder (Counts 1 and 2)

As noted, Peterson testified at trial that after he and Bolden committed the robberies in the Denny's parking lot, they got back into Wildman's vehicle with Wildman and Hay and Wildman drove away. They drove around for a while to look for more people to rob and eventually drove to a Wells Fargo bank. A truck was parked in front of

the bank and Peterson saw a man exit the truck and walk toward ATM machines located at the front of the bank. Wildman backed her vehicle into a parking space at the side of the bank and told Bolden and Peterson to "get out and go get him." Janowicz testified that when he interviewed Hay, she told him that Wildman had ordered a "lick"—meaning "robbery"—at the bank.<sup>3</sup>

According to Peterson, he and Bolden exited Wildman's vehicle. Bolden walked ahead of Peterson holding the gun he had used at Denny's. Peterson stopped and lost sight of Bolden when Bolden walked around to the front of the bank. Peterson waited where he stopped and eventually heard two shots. Immediately after the shots were fired, Bolden came running back toward Peterson and the two ran back to Wildman's vehicle and got inside it. Bolden said he "messed up." Wildman drove away from the bank at a fast speed and dropped Peterson off at his grandmother's house.

Taxi driver Desiray Partridge testified that around 4:00 a.m. on October 7, 2012, she was driving her cab in Victorville. When she turned onto the street where the Wells Fargo Bank was located, she was blinded by light from the headlights of Duane M.'s truck, which was stopped partially on the sidewalk and partially on grass by the sidewalk. The truck's engine was running. Partridge called 911 and told the dispatcher she could see Duane M. through a hole in the driver's side window but could not tell if he was breathing.

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<sup>3</sup> Hay told Janowicz that Wildman "needed the money" and "said she needed my son and [nephew] to go get the money." Janowicz said, "to go hit a lick." Hay responded, "Yeah, she made them go do a lick. She set them up."



A crime scene specialist responded to the scene at around 5:00 a.m. on October 7, 2012, and testified at trial. She identified photographs of the victim (Duane M.) seated in the driver's seat of his truck, and photographs showing a hole in the driver's side window. She testified that the victim was "slumped over the center console and the center console was full of blood. The blood ran through the right front floorboard . . . and dripped underneath the vehicle."

The forensic pathologist who performed the autopsy on Duane M. testified that there were entry gunshot wounds on the nose, the left side of the neck, the right upper chest, and the left side of the abdomen. There were exit gunshot wounds on the right side of the neck and the right lower chest. There were injuries on the face caused by shattering glass, and there were pieces of glass imbedded in the face, which showed Duane M. was behind glass when at least one of the shots was fired. The bullet that entered through the nose lodged in the brain and incapacitated Duane M. The cause of death was multiple gunshot wounds.

## DISCUSSION

### I. BOLDEN'S APPEAL

#### A. *Discharge of Juror*

Bolden contends the trial court deprived him of due process, a fair trial, and a representative jury when it discharged a juror without evidence that he was unable to perform his duty as a juror. We conclude the court properly discharged the juror.

#### Background

During a break in the prosecutor's closing argument at trial, Juror No. 7 of the

Bolden jury addressed the court and counsel outside the presence of the other jurors about interactions he had with a woman whom defense counsel believed to be Bolden's cousin. Juror No. 7 explained his initial encounter with the woman as follows: "This morning before getting into the court, there was a young lady sitting across this hallway that I had never seen before, and she seemed distraught. So just making conversation I just told her, you know, cheer up, nothing can be that bad. You know, . . . one door closes, another one opens. That was it. Have a good day.

"Then we came in, and she came in through here and apparently she's with the Bolden, related to the Bolden party.

"Then we went at the break, I went to the parking lot to smoke a cigarette, and the lady approached me, and the first thing she said was did you know you're not supposed to talk to me? [¶] Talk about stress, I didn't even know her, I don't know her, I don't know her. And I said, I don't know.

"And she said—that was all she said. [¶] Then she asked me for a cigarette, and I was gonna smoke a cigarette anyway. I told her, well, they're in my car, I'll just go get it. [¶] And I went to get my cigarettes. I gave her one. And I smoked my cigarette. We didn't—we didn't—I didn't say anything after that. [¶] But the fact that she said that I wasn't supposed to speak with her, that caught my attention, and it was, to me, it was something that I needed to bring up to the Court."

The court responded, "Certainly. My question is, after she said you shouldn't be talking, and she asked you for a cigarette, I don't understand your response. Pursuant to my instructions, if you knew you shouldn't be talking to her, why did you go and get—

give her a cigarette?" Juror No. 7 replied, "'Cause I was going to get one anyway." He added, "I didn't know who she was. But anyway, you're right, you're right. She caught me off guard, is basically what happened."

The court stated it understood Juror No. 7 was caught off guard, but pointed out that "after . . . [the woman] made the statement that you shouldn't be talking and you gave her a cigarette, that is like a gift, even though it may be insignificant to you[.]" The court further described the act of giving the woman a cigarette as one of "kindness" and "sympathy." Juror No. 7 said he understood and added, "Courtesy, I took it as a courtesy."

The court explained, "Yes. And unfortunately, we have to dispense with common courtesies such as hello, how are you, even with the attorneys, if they see you in the hallway." The court then asked Juror No. 7 if his ability to be fair and impartial had been affected, and he responded, "Absolutely not, no."

After Juror No. 7 left the courtroom to join the other jurors, the court asked counsel what their position was regarding Juror No. 7. The prosecutor noted that Juror No. 7 indicated he could remain unbiased and stated, "Taking him at his word, I would just submit it." Bolden's counsel stated, "I didn't hear anything that I think makes him less biased [*sic*][<sup>4</sup>] in any way. I think he expressed that it was a benign contact and he wasn't trying to, I guess, obtain information or curry favor." When the court asked

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<sup>4</sup> Counsel presumably meant to say he had not heard anything that made Juror No. 7 less *impartial* or *more* biased.

defense counsel's position as to what the court should do, counsel responded, "I think we can maintain him on the jury."

The court then stated: "I have a different concern, and I expressed that concern with him. The jury instructions were clear, someone contacts you, even inadvertently . . . then you . . . should terminate . . . the conversation, don't discuss it with any other juror, and notify the bailiff. [¶] At the point that the person told him, you know we shouldn't be talking, he should have terminated the conversation. [¶] When she went on to ask for a cigarette, that was in direct violation of my orders, so if you want to fight . . . to keep him on this jury and not to be replaced, make your record now and I'll entertain it."

The prosecutor observed that as far as Juror No. 7 knew, Bolden's cousin was a member of the public and what Juror No. 7 did "was inadvertent." The prosecutor stated, "I don't believe that he was talking in any way about the context of this trial or any content. And based upon that, I think that at least in the juror's eyes he appeared to have no more than a regular conversation with a member of the public." The court agreed but noted "the jury instructions include members of the public." The court stated its concern was that Juror No. 7 "provided her with a cigarette after she asked for it."

Bolden's counsel submitted on the court's comments, and stated, "Thinking about it, I was thinking not only vis-à-vis he and she, but there may be other jurors who saw the conduct. I'm speculating, but . . . ." The court agreed that counsel was speculating and stated, "My concern is that once she said we should not be talking, then that's—the instruction was not that clear as to this particular conduct. And what I mean by that, it

was if anyone contacts you and tries to influence you . . . and talk about this case, then you're to terminate the conversation."

The court then announced its decision to replace Juror No. 7 unless the defense thought its case would be damaged and replacing the juror was "an overreaction." The court explained, "I just have a zero tolerance for jurors' behavior. We have drilled it into them to remain separate from each other, to stay in a particular location, and we've drilled into them the importance of this case. [¶] The prior contact in the hallway, I'm not that concerned with. It's the contact after he knew he recognized her in this courtroom, even at that point he should have brought it to [the bailiff's] attention to say, I have something to tell the judge, or especially in the parking lot to say, you're right, we shouldn't be talking to each other. It should not have been incumbent upon the family member. [¶] Orders are orders, and they're to be obeyed."

The prosecutor informed the court that he did not object to Juror No. 7's being discharged, although he added, "I think that it was inadvertent, and I think he understands the Court's order completely." Bolden's counsel then stated, "My only concern now, now that I'm digesting a little bit and we've talked about it is that I would hope that he wouldn't feel put upon because my client's relative possibly thereafter then approached him."

The court then excused Juror No. 7. The court explained to Juror No. 7 that he was being discharged "because anyone on the outside seeing [his interaction with Bolden's cousin] could infer that the discussion was about something else." The court added that "we just don't know the perception, and we have to be very careful about the

perception that we send to the community regarding our judicial process." The court replaced Juror No. 7 with an alternate juror.

### Legal Principles and Analysis

Section 1089 provides, in relevant part: "If at any time, whether before or after the final submission of the case to the jury, a juror . . . upon . . . good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors." "A trial court learning of grounds for dismissal 'has an affirmative obligation to investigate.' [Citation.] However, '[b]oth the scope of any investigation and the ultimate decision whether to discharge a given juror are committed to the sound discretion of the trial court.' " (*People v. Duff* (2014) 58 Cal.4th 527, 560 (*Duff*).)

"A juror who refuses to follow the court's instructions is 'unable to perform his duty' within the meaning of Penal Code section 1089." (*People v. Williams* (2001) 25 Cal.4th 441, 448.) The fact that a juror may be able to disregard the court's instructions without recourse "does not diminish the trial court's authority to discharge a juror who, the court learns, is unable or unwilling to follow the court's instructions." (*Id.* at p. 449.) "[A] court may exercise its discretion to remove a juror for serious and wilful misconduct . . . even if this misconduct is 'neutral' as between the parties and does not suggest bias toward either side." (*People v. Daniels* (1991) 52 Cal.3d 815, 863-864 (*Daniels*).)

"[I]n reviewing a decision to excuse a juror, we do not ask only whether substantial evidence supports the decision—i.e., whether there is evidence from which a reasonable trial court could have concluded dismissal was warranted—but further whether it appears as a 'demonstrable reality' that the trial court actually did rely on such evidence as the basis for its decision." (*Duff, supra*, 58 Cal.4th at p. 560.) "The [demonstrable reality] requirement we add to traditional substantial evidence review is that the record establish the actual basis for the trial court's decision. So long as it does, we ask only whether the evidence relied upon was sufficient to support that basis as grounds for dismissal; we do not independently reweigh the evidence or demand more compelling proof than that which could satisfy a reasonable jurist." (*Ibid.*)

We conclude Bolden did not effectively preserve his challenge to the discharge of Juror No. 7 for appeal and, in any event, the record supports the court's exercise of discretion to discharge Juror No. 7—i.e., there was sufficient evidence for the court to reasonably find discharging Juror No. 7 was warranted, and the record shows a demonstrable reality that the court actually relied on that evidence as the basis for its decision to excuse Juror No. 7. Additionally, we reject Bolden's contention that no showing of prejudice is required to obtain a reversal for an erroneous discharge of a juror under section 1089, and conclude that to the extent the court erred in discharging Juror No. 7, the error was harmless.

### Forfeiture

The People contend Bolden forfeited his claim that Juror No. 7 was erroneously discharged by failing to object to the discharge below. The People cite *People v. Holt*

(1997) 15 Cal.4th 619 (*Holt*) as authority for their forfeiture argument. Bolden contends his trial counsel's statement, "I think we can maintain [Juror No. 7] on the jury, your Honor[.]" was the functional equivalent of an objection and, as such, was sufficient to preserve the erroneous discharge issue for appeal. We disagree.

In *People v. Ashmus* (1991) 54 Cal.3d 932 (*Ashmus*), the defendant claimed the trial court's discharge of a juror was error under both California law and the United States Constitution. (*Id.* at p. 987, fn. 16.) The *Ashmus* court decided the discharge was proper under section 1089 (*id.* at pp. 986-987), but the defendant failed to preserve his claim of error under the United States Constitution because he had "made no objection whatever on federal constitutional grounds." (*Id.* at p. 987, fn. 16.) The *Ashmus* court held that "[a]s a general rule, a defendant may properly raise [on appeal] a point involving a trial court's allegedly improper discharge of a juror only if he made the same point below."<sup>5</sup> (*Ashmus, supra*, at p. 987, fn. 16); accord, *People v. Wilson* (2008) 43 Cal.4th 1, 25 [defendant forfeited claim of erroneous discharge of juror by failing to object to discharge or move for a mistrial]; see *People v. Young* (2017) 17 Cal.App.5th 451, 461.)

Here, because Bolden's trial counsel did not specifically object to the discharge of Juror No. 7 on the ground the requirements for discharge under section 1089 and case law were not met, that claim is forfeited on appeal. Although Bolden's counsel initially indicated he thought Juror No. 7 could be kept on the jury because his encounters with

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<sup>5</sup> The California Supreme Court in *Holt* extended the *Ashmus* forfeiture rule to a claim of improper excusal of a prospective juror, holding that "the *Ashmus* rule [applies] to *excusing*, as well as to *discharging*, a juror." (*Holt, supra*, 15 Cal.4th at p. 656, italics added.)



Bolden's cousin did not appear to affect his impartiality, Bolden's counsel's final comments to the court on the issue indicated he was concerned that if other jurors or members of the public were aware of the encounters they might have the impression Juror No. 7's impartiality was compromised by them. The court reasonably viewed counsel's expression of that concern as acquiescence to its decision to discharge Juror No. 7. The court took its cue from Bolden's counsel when it explained to Juror No. 7 that he was being discharged because "anyone on the outside seeing [his communication with Bolden's cousin] could infer that the discussion was about something else[,] and "we just don't know the perception, and we have to be very careful about the perception that we send to the community regarding our judicial process." When the court announced its decision to discharge Juror No. 7, Bolden's counsel did not object for the record, or state sufficient grounds for an objection. Counsel's overall comments to the court on the issue of Juror No. 7's excusal did not amount to "the functional equivalent of an objection (i.e., statement of opposition or disagreement) to the excusal on specific grounds . . . ." (*People v. McKinnon* (2011) 52 Cal.4th 610, 636.)

#### The Discharge of Juror No. 7 Was Not an Abuse of Discretion

Assuming Bolden's counsel sufficiently preserved his challenge to Juror No. 7's discharge on appeal by initially stating that he thought Juror No. 7 could remain on the jury, we conclude the court did not abuse its discretion in discharging Juror No. 7.

It is clear from the court's discussion with counsel and explanation to Juror No. 7 of the reason for his discharge that the main basis for the discharge was the appearance of impropriety—i.e., the risk that it would appear to anyone who might have witnessed the

exchanges between Juror No. 7 and Bolden's cousin that Juror No. 7 was biased in Bolden's favor. Additionally, the court expressed the view that the exchanges reflected that Juror No. 7 was not following the court's instructions and orders to the jury.

The court's instructions to the jury at the beginning of the trial included the following: "During the trial, do not speak to a defendant, witness, lawyer, *or anyone associated with them*. Do not listen to anyone who tries to talk to you about the case or about any of the people or subjects involved in it." (Italics added.) The court further instructed the jury that "if anyone tries to influence you or any juror, you must immediately tell the bailiff."

As noted, regarding the second exchange between Juror No. 7 and Bolden's cousin, the court stated, "At the point that the person told him . . . we shouldn't be talking, he should have terminated the conversation. [¶] When she went on to ask for a cigarette, that was in direct violation of my orders . . . ." The court expressed concern about Juror No. 7's "contact [with Bolden's cousin] after he knew he recognized her in this courtroom, even at that point he should have brought it to [the bailiff's] attention to say, I have something to tell the judge, or especially in the parking lot to say, you're right, we shouldn't be talking to each other. It should not have been incumbent upon the family member. [¶] Orders are orders, and they're to be obeyed." The court asked Juror No. 7 why he gave Bolden's cousin a cigarette after he knew he should not be talking to her, clearly indicating his doing so was a violation of the court's instructions. Juror No. 7 responded, "I didn't know who she was. But anyway, you're right, you're right. She caught me off guard, is basically what happened."

Based on Juror No. 7's violation of the court's instruction to not speak to anyone associated with a defendant, the court could reasonably conclude that Juror No. 7 might not follow other instructions. (See *Daniels, supra*, 52 Cal.3d at p. 865 ["[A] judge may reasonably conclude that a juror who has violated instructions to refrain from discussing the case or reading newspaper accounts of the trial cannot be counted on to follow instructions in the future."].) Thus, there was "evidence from which a reasonable trial court could have concluded [discharge of Juror No. 7] was warranted [and] it appears as a 'demonstrable reality' that the trial court actually did rely on such evidence as the basis for its decision." (*Duff, supra*, 58 Cal.4th at p. 560.)

The court's decision to discharge Juror No. 7 is further supported by the court's concern about "the perception that we send to the community regarding our judicial process." Standing alone, the mere showing of a private communication between a juror and a relative of a defendant "does not raise a presumption that the juror was improperly influenced." (*People v. Cobb* (1955) 45 Cal.2d 158, 161.) However, coupled with the valid concern that Juror No. 7 was unwilling or unable to follow the court's instructions, the court's concern about the appearance of impropriety potentially created by Juror No. 7's contacts with Bolden's cousin supports the court's exercise of discretion to discharge him.

Finally, the court could reasonably be concerned that Juror No. 7's impartiality was compromised by his contacts with Bolden's cousin. Although the court did not expressly specify bias as a basis for its decision to discharge Juror No. 7, the court noted the cigarette Juror No. 7 gave Bolden's cousin was "like a gift, even though it may be

insignificant to you[,] and described the act of giving the cigarette as one of "kindness" and "sympathy." Bolden's counsel's comment that he was concerned about Juror No. 7's feeling "put upon" because Bolden's cousin approached him reflects the valid concern that Juror No. 7 might have felt more inclined to decide the case favorably to Bolden after expressing encouragement to Bolden's cousin and giving her a cigarette when she asked him for one. The two interactions established a connection between Juror No. 7 and Bolden's cousin that the court could reasonably view as jeopardizing Juror No. 7's ability to impartially evaluate the evidence against Bolden.

Juror No. 7's exchanges with Bolden's cousin constituted sufficient evidence for the court to reasonably find that discharging Juror No. 7 was warranted, and the record shows a demonstrable reality that the court actually relied on that evidence as the basis for its decision to excuse Juror No. 7. (*Duff, supra*, 58 Cal.4th at p. 560.)

#### Harmless Error Analysis

To the extent the court erred in discharging Juror No. 7, we conclude the error was harmless. Bolden contends that when error in discharging a juror under section 1089 is shown, reversal is required; it is unnecessary to show the error was prejudicial to defendant. We disagree. The requirement of showing that error in discharging a juror prejudiced the defendant is well established in California case law.

In *People v. Hamilton* (1963) 60 Cal.2d 105, the California Supreme Court concluded that a juror had been erroneously discharged during the penalty phase of a trial that resulted in a death penalty judgment on a murder count (*id.* at p. 111), and the error was prejudicial because the juror was discharged "on the stated ground that she 'had

disclosed her opposition to a verdict imposing the death penalty.' Thus, her disqualification could only be beneficial to the prosecution and prejudicial to the defense." (*Id.* at pp. 122, 127-128.) The *Hamilton* court applied the standard for reversal under *People v. Watson* (1956) 46 Cal.2d 818—i.e., " 'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*Hamilton*, at pp. 121, 135-138.) In *People v. Cleveland* (2001) 25 Cal.4th 466, the California Supreme Court cited *Hamilton* in concluding that the trial court abused its discretion in discharging a juror under section 1089 on the ground the juror was " 'not functionally deliberating with the other jurors,' " and that the erroneous discharge was prejudicial and required reversal of the judgment. (*Id.* at p. 486, citing *Hamilton, supra*, 60 Cal.2d at p. 128.)

In *People v. Bowers* (2001) 87 Cal.App.4th 722, the Court of Appeal applied the *Watson* standard for reversal to an erroneous discharge of a juror under section 1089, concluding the discharge was prejudicial under that standard because the record indicated the discharged juror "was the lone holdout juror who steadfastly held to his belief defendant was not guilty throughout the course of deliberations and until he was discharged. Had he been allowed to remain on the jury panel, it is reasonably probable the case would have ended in a mistrial; a more favorable result for defendant than conviction." (*Id.* at pp. 735-736.)

In *People v. Abbott* (1956) 47 Cal.2d 362 (*Abbott*), the California Supreme Court concluded the trial court did not abuse its discretion in determining there was good cause to discharge a juror and, moreover, there was no showing that the defendant was

prejudiced by the discharge. (*Id.* at pp. 371-372.) The Supreme Court reasoned that the defendant "was not entitled to be tried by a jury composed of any particular individuals. [Citation.] The juror who was substituted for [the discharged juror] was examined fully by both sides on *voir dire*, accepted as a qualified alternate and served as such from the start of the trial until seated as a regular juror. There is no claim that he was unable to render a fair verdict." (*Id.* at p. 372.)

Similarly, the Court of Appeal in *People v. Hall* (1979) 95 Cal.App.3d 299 (*Hall*) decided the trial court did not abuse its discretion in discharging a juror for good cause and that, in any event, the defendant had not shown he was prejudiced by the substitution of an alternate juror. The *Hall* court noted: "It is long-established law in California that where an alternate juror, approved by defendant in voir dire, is allowed to deliberate on the jury panel, the defendant bears a heavy burden to demonstrate that he was somehow harmed thereby." (*Id.* at p. 307.)

The *Hall* court further noted: In *People v. Howard* (1930) 211 Cal. 322 . . . the court explained . . . : 'We may assume that the defendant was satisfied that the alternate jurors thus selected would give him the fair and impartial trial to which he was entitled, should either be called in lieu of one of the other jurors. . . . [¶] . . . It is not claimed that the verdict would have been any different had the alternate juror not participated in the deliberations of the jury.' " (*Hall, supra*, 95 Cal.App.3d at p. 307.)

Bolden relies on two California Supreme Court cases for the proposition that no prejudice need be shown for erroneous discharge of a juror during trial under section 1089: *People v. Allen and Johnson* (2011) 53 Cal.4th 60 (*Allen*) and *People v. Wilson*

(2008) 44 Cal.4th 758 (*Wilson*). In *Wilson*, the defendant contended the discharge of Juror No. 5 during the penalty phase of his capital murder case violated his constitutional right to a fair and impartial jury and unanimous jury under the Sixth and Fourteenth Amendments to the United States Constitution, and also violated his rights under section 1089. The *Wilson* court decided the trial court erred under section 1089 because it was not shown to a demonstrable reality that Juror No. 5 was unable to perform his duty as a juror. (*Id.* at pp. 814, 841.) Consequently, the *Wilson* court concluded, "we have no choice but to reverse the penalty verdict." (*Id.* at p. 841, fn. omitted.)

It is unclear why the *Wilson* court did not discuss or even mention any standard for reversal applicable to error in discharging a sitting juror during trial. However, in light of established case law, including California Supreme Court precedent, supporting the application of harmless error analysis to an erroneous juror discharge under section 1089, we presume the *Wilson* court omitted such discussion because the prejudice to the defendant resulting from the erroneous discharge of Juror No. 5 was obvious. The fact that the defendant was the party challenging the discharge of Juror No. 5 on appeal reflects that the defendant claimed he was prejudiced by the discharge. Further, the defendant in *Wilson* was African-American and Juror No. 5, was the only African-American that served on his jury. (*Wilson, supra*, 44 Cal.4th at p. 813.) Juror No. 5 had initially voted for death, but had changed his mind and was the only juror holding out for a life sentence at the time he was discharged. (*Id.* at pp. 813-814.) Under these circumstances, it was unnecessary for the *Wilson* court to state the obvious—that

erroneously discharging Juror No. 5 based on his unwillingness to vote for the death penalty was prejudicial to the defendant.

It was similarly obvious in *Allen* that the trial court's error in discharging a juror during the guilt phase of a capital murder trial was prejudicial to the two defendants in that case. The trial court discharged the juror *over the defendants' objection* on two grounds: (1) that he had prejudged the case—i.e., made up his mind that the prosecution failed to make its case before the matter was submitted to the jury; and (2) he had relied on facts outside the record in forming his opinion. (*Allen, supra*, 53 Cal.4th at pp. 65, 68, 71, 73.) The juror had commented more than once during deliberations that when the prosecution rested, it had not convinced him. (*Id.* at p. 68.) After the court discharged the juror and replaced him with an alternate, the jury returned guilt phase verdicts convicting both defendants of first degree murder. (*Id.* at pp. 63, 69.) The *Allen* court concluded the trial court abused its discretion in discharging the juror as to both grounds and reversed both the guilt and penalty phase judgments. (*Id.* at pp. 76, 78-79.) As in *Wilson*, it was unnecessary for the *Allen* court to state the obvious—that the defendants were prejudiced by the erroneous discharge of a juror who during deliberations had stated the prosecution failed to make its case. In any event, neither *Wilson* nor *Allen* contains any language that disapproves cases applying harmless error analysis to alleged error in discharging a juror or that creates a per se reversal standard for such error.

We conclude Bolden has failed to show the discharge of Juror No. 7 was prejudicial. Juror No. 7 was excused before jury deliberations and there was no evidence that he was leaning toward either side. In the words of the *Abbott* court, "The juror who



was substituted for [Juror No. 7] was examined fully by both sides on *voir dire*, accepted as a qualified alternate and served as such from the start of the trial until seated as a regular juror. There is no claim that [she] was unable to render a fair verdict." (*Abbott, supra*, 47 Cal.2d at p. 372.) Nor does Bolden claim that the verdict would have been any different had the alternate juror not participated in the jury deliberations. To the extent the court erred in discharging Juror No. 7, the error was harmless.

B. *Sufficiency of the Evidence to Support the Gang Enhancement Finding*

Bolden contends there was insufficient evidence to support his gang enhancements. Specifically, Bolden claims there was insufficient evidence that he committed each offense for the benefit of a gang and with the specific intent to promote, further, or assist criminal conduct by gang members.

Legal Principles and Analysis

"We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction." (*Wilson, supra*, 44 Cal.4th at p. 806.) "In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with

a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).)

Section 186.22, subdivision (b)(1) provides a sentencing enhancement for felonies "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." The prosecution has the burden of proof (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484), and must establish both prongs of the gang enhancement. "First, the prosecution is required to prove that the underlying felonies were 'committed for the benefit of, at the direction of, or in association with any criminal street gang.' (§ 186.22(b)(1).)[<sup>6</sup>] Second, there must be evidence that the crimes were committed 'with the specific intent to promote, further, or assist in any criminal conduct by gang members.' (§ 186.22(b)(1) [Citation.])" (*People v. Rios* (2013) 222 Cal.App.4th 542, 561 (*Rios*).)

" 'In order to prove the elements of the criminal street gang enhancement, the prosecution may . . . present expert testimony on criminal street gangs.' [Citation.]

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<sup>6</sup> The term "criminal street gang" is defined in section 186.22, subd. (f), as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." In the present case, the parties stipulated that The Rolling 60's Neighborhood Crips (Rolling 60's) met the definition of a criminal street gang under section 186.22, subdivision (f).

' "Expert opinion that particular criminal conduct benefited a gang" is not only permissible but can be sufficient to support [a] gang enhancement.' [Citations.] While an expert may render an opinion assuming the truth of facts set forth in a hypothetical question, the 'hypothetical question must be rooted in facts shown by the evidence.' [Citation.] Indeed, an 'expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors." ' [Citations.] [¶] As for the specific intent prong, ' "[i]ntent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense." ' [Citation.] [T]he scienter requirement may be satisfied with proof 'that the defendant intended to and did commit the charged felony with known members of a gang,' from which 'the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.' " (*People v. Franklin* (2016) 248 Cal.App.4th 938, 948-949.)

We conclude there was sufficient evidence to support the jury's gang enhancement finding as to Bolden. As noted, the jury found true that Bolden committed the robberies at Denny's (counts 5 and 6) for the benefit of or in association with a criminal street gang. Peterson testified at trial that he "heard gang stuff" during the robberies—specifically, that he heard Bolden say "Rolling 60 Crip."

Robbery victim Dangerfield similarly told police officers who interviewed him on two separate occasions—immediately after the robbery and about eight days after the robbery—that he heard one of the robbers shout out a gang name, although the name he reportedly heard was "Nutty Blocc Crip" and not Rolling 60's Crip. At trial when the

prosecutor asked if he remembered telling a police officer that he heard "Nutty Blocc," Dangerfield said he thought that he was arguing or debating earlier with a guy in the bar who was from Nutty Blocc. The prosecutor then asked: "It wasn't one of the individuals that was demanding property?" Dangerfield responded: "Nah, I was intoxicated, I don't remember that." Based on Dangerfield's statements to the police and Peterson's testimony, the jury could reasonably conclude Bolden shouted out the name of his gang (Rolling 60's), Dangerfield heard him do so, but misremembered the name shouted as being "Nutty Blocc" because he had been arguing with a member of Nutty Blocc at the bar shortly before the robbery.

Detective Adam Salsberry testified as the prosecution's gang expert. He was familiar with the Rolling 60's gang and their symbols. Rolling 60's members wear the color blue and certain sports memorabilia to signify where they are from. They wear Seattle Mariners and North Carolina Tarheels attire and hats because the "S" for Seattle signifies 60's, and the "NC" for North Carolina signifies Neighborhood Crips. They also wear New York Yankees attire because "[t]he NY with the New York Yankees signifies Neighborhood Crip . . . ."

Salsberry was familiar with Rolling 60's hand sign and identified a photograph showing Bolden making that sign and wearing a blue rag around his neck, representing Crips. Salsberry identified another photograph showing Bolden making a C, which represents Crips, with his right hand, and several other photographs showing Bolden making Crips hand signs and wearing blue. In one of the photographs, Bolden was wearing a Seattle Mariners baseball hat, a common symbol for Rolling 60's.

Salsberry also identified a date book recovered from Bolden's residence. Written on the front of the date book was "Rich Rolling 60's" and "Rolling 60's Neighborhood Crips," but the "h" in Rich was crossed out. Salsberry explained that crossing out the "h" showed "disrespect to rival Hoover Crips, who are just east of the 60s in the L.A. region." Bolden's name was written on the second page. A writing recovered from Bolden's room included a large depiction of "West Side R 60s" with the letter "N" inside the 6 and the letter "H," crossed out, inside the 0 to show disrespect for the Hoover Crips gang. Another writing found at Bolden's residence contained the notations "RSC" for Rolling 60's and "NHC" for Neighborhood Crips with the "H" crossed out to show disrespect for the Hoover Crips. Salsberry identified a photograph of a belt that had the following letters inscribed on it: "WS" for West Side; "NH" for Neighborhood; "RSC" for Rolling 60's Crip; and "BK" for Blood Killer, showing disrespect for the rival Bloods gang. The belt was found at Bolden's residence attached to a pair of pants in a laundry basket in Bolden's room. Salsberry testified that he believed Bolden was a member of the Rolling 60's Crip gang, "based on the writings we found in his room . . . , the belt that was attached to some pants, and . . . the photographs also recovered during the investigation."

At trial, Peterson also identified Bolden throwing gang signs in various photographs recovered from Bolden's residence. In one photograph, Peterson was with Bolden and both were throwing the gang sign for "Neighborhood." Peterson testified that he was telling the truth when he told police detectives who interviewed him that Bolden "was a 60 Crip," and that Bolden had been involved with the gang for about four or five years. Salsberry initially testified that, in his opinion, Peterson was an associate of

Rolling 60's based on two New York Yankee hats and a child's notebook recovered from his bedroom that had crossed-out H's written on it. However, Salsberry later testified that based on the photograph of Peterson throwing gang signs with Bolden, his opinion was that Peterson was an actual member of the gang.

Before Salsberry changed his opinion about Peterson, the prosecutor asked him the following hypothetical question: "Assume that you have a member and an associate of the Rolling 60's that go into a parking lot to commit a robbery, and the Rolling 60's member yells out Rolling 60's during the commission of the robbery. Do you have an opinion as to whether or not that was done for the benefit of the gang?" Salsberry responded: "Oh, absolutely. You put your gang out there, especially when you're committing a violent act such as robbing somebody, that just instills [fear in] the victim who you're robbing, and it also instills fear into potential witnesses who are reluctant to call because they know a gang's involved in this crime now."

The evidence discussed above sufficiently supports the jury's finding that Bolden committed the Denny's robberies for the benefit of the Rolling 60's gang. The jury could also reasonably find that Bolden committed the robberies in association with the gang. "A trier of fact can rationally infer a crime was committed 'in association' with a criminal street gang within the meaning of section 186.22, subdivision (b) if the defendant committed the offense in concert with gang members." (*People v. Leon* (2016) 243 Cal.App.4th 1003, 1021.) Here, the jury could reasonably conclude that the robberies were committed in association with the Rolling 60's gang because there was substantial evidence that Bolden was a member and that Peterson was either a member or associate

of the gang acting in concert with Bolden. Peterson's plea agreement with the prosecution was admitted in evidence and revealed that Peterson had admitted to a gang allegation under section 186.22(b)(1)(C) in connection with the homicide of Duane M.

The jury could reasonably make a true finding on the second (specific intent) prong of section 186.22, subdivision (b) even if Bolden had acted alone in committing the robberies for the benefit of the Rolling 60's gang. "There is no requirement in section 186.22, subdivision (b), that the defendant's intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense defendant commits. To the contrary, the specific intent required by the statute is 'to promote, further, or assist in *any* criminal conduct by gang members.' " (*People v. Hill* (2006) 142 Cal.App.4th 770, 774.) Accordingly, Bolden's commission of the robberies "qualified as the gang-related criminal activity. No further evidence on this element was necessary." (*Ibid.*)<sup>7</sup>

C. *Refusal to Redact Peterson's Promise to Testify Truthfully from his Plea Agreement*

Both Bolden and Wildman contend the court prejudicially erred by refusing to redact from accomplice Peterson's plea agreement Peterson's promise to testify truthfully. Bolden additionally contends the court should have redacted portions of the plea agreement stating that the trial court would determine whether Peterson's testimony was

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<sup>7</sup> In light of our conclusion that the jury's gang enhancement finding is sufficiently supported by the evidence as to Bolden, we reject Bolden's contention that the court prejudicially erred in admitting gang evidence.

complete and truthful and that he admitted gang allegations. We conclude the court did not err in refusing to redact any part of Peterson's plea agreement.

### Background

Before trial, Wildman filed a motion in limine for an order directing the prosecution to redact from Peterson's plea agreement "all references that the witness must testify truthfully." In relevant part, Peterson's plea agreement stated: "Phillip Peterson agrees to testify truthfully and completely at all proceedings and hearings . . . relative to the murder of Duane [M.], the robbery of Altus Dangerfield, the robbery of Dion Washington and other transactionally related crimes."

The agreement further stated: "The People agree that if the defendant Phillip Peterson testifies truthfully and completely at all hearings, preliminary hearings, trials and retrials the People will move to withdraw [his] plea to the first degree murder charge and the associated allegations as well as the second degree robbery and associated allegation. Peterson would then enter a new and different plea to an added Count 7, Voluntary Manslaughter of Duane [M.], for eleven years in state prison. Peterson will also admit to an added allegation of Penal Code Section 186.22(b)(1)(C), gang allegation, for an additional ten years in state prison. Peterson will also plead guilty to Count 5, Second Degree Robbery for one third the mid-term for one year state prison to be served consecutively to the added Count 7. The Judge will determine the completeness & truthfulness of . . . Peterson's testimony. The total prison sentence would be 22 years if . . . Peterson fulfills his obligations under this agreement. [¶] Phillip Peterson understands that he shall be subjected to prosecution for perjury for any intentional



deviation from the truth uttered by him in any proceeding in this case. Peterson also understands that if the Judge determines that [his] testimony was not complete or truthful, [he] will receive the commitment to state prison for fifteen years (15) plus fifty years to life (50-life)."

The agreement also provided: "Overriding all else, it is understood that this agreement extracts from . . . Peterson an obligation to do nothing other than tell the truth under oath. Peterson shall tell the truth no matter who asks the questions—the prosecutor, the judge, or a defense attorney." Finally, the agreement stated that "[t]he People may require at their discretion that . . . Peterson give a video and/or audio taped interview which also must be complete and truthful."

Wildman argued the agreement's references to Peterson's obligation to testify truthfully should be excluded under Evidence Code section 352 because their probative value was outweighed by their prejudicial effect. Wildman relied primarily on *United States v. Roberts* (9th Cir. 1980) 618 F.2d 530 (*Roberts*), in which the court stated: "A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation. [¶] Conveying this message explicitly is improper vouching. [Citations.] We conclude that conveying it by implication is equally improper." (*Id.* at p. 536.) Bolden joined in Wildman's motion.

At the hearing on the motion, Wildman's counsel argued that portions of Peterson's plea agreement referencing his requirement to testify truthfully should be redacted because they would bolster Peterson's credibility and give the jury the impression that the prosecution was "giving their rubber stamp that [Peterson's testimony] was truthful." The court tentatively ruled that it would exercise its discretion under Evidence Code section 352 to deny the motion to redact. Wildman's counsel then further argued that the challenged portions of the plea agreement would mislead the jury by giving them the impression that Peterson is "obviously testifying truthfully, and it's the [District Attorney's] office that's backing his [testimony], and, therefore, it gives [his testimony] more credibility than it deserve[s]. [I]t's giving the illusion that [his testimony] must be a truthful statement if the district attorney is offering him as a witness." Bolden's counsel agreed with Wildman's counsel and viewed the challenged language in Peterson's plea agreement as the prosecution's "vouching" for the truthfulness of Peterson's testimony.

The court stated that it disagreed with Wildman's counsel "because [the requirement to testify truthfully is] offered to refute any inference that he's testifying for an advantage from the district attorney's office . . . ." The prosecutor argued that to redact Peterson's plea agreement "would leave [the jury] with solely a defense version of the events. It would be, well, he just did this to get out of it. He got the sweetheart deal, and he must be testifying in exactly the way that the [prosecutor] expects him to because . . . there's nothing in this plea agreement that says he even has to tell the truth." The court agreed and denied the motion.

At trial, Bolden's counsel brought Peterson's plea agreement to the jury's attention during his cross-examination of Peterson. Peterson admitted that he had entered into a plea agreement with the district attorney under which he pled guilty to, in counsel's words, "a variety of crimes that were charged in this case," including "murder," a "gang allegation," and "personally . . . discharging a weapon[.]" Peterson also admitted to pleading guilty to a count of robbery with a gang allegation. He admitted that he had, in counsel's words, "worked out a deal in this case whereby if you . . . testify in a manner that is truthful, that you'll get a different deal . . . in terms of maximum time."

On redirect examination, the prosecutor raised Peterson's plea agreement in the following exchange:

"Q Do you remember that the only thing you agreed to do is to testify truthfully and completely?

"A Yes.

"Q Is that fair?

"A Yes.

"Q And the question of truthfulness is one that the judge has to decide; isn't that right?

"A Yes.

"Q It's not for me to decide; is that true?

"A Yes."

### Legal Principles and Analysis

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns

of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124 (*Rodrigues*).)

Even if the trial court errs in admitting or excluding evidence, the error does not require reversal unless it "resulted in a miscarriage of justice. (Evid. Code, §§ 353, subd. (b), 354.) " '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.)

California case law addressing the propriety of prosecutorial vouching has largely developed through claims of prosecutorial misconduct. " Impermissible "vouching" may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony.' " (*People v. Williams* (1997) 16 Cal.4th 153, 257 (*Williams I*).)

"A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of [his or] her office behind a witness by offering the impression that [he or] she has taken steps to

assure a witness's truthfulness at trial. [Citation.] *However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' [his or] her comments cannot be characterized as improper vouching.*" (*People v. Frye* (1998) 18 Cal.4th 894, 971 (*Frye*), italics added.)

"It is settled that making a record of the terms of a plea agreement requiring a witness to tell the truth does not constitute impermissible vouching." (*People v. Williams* (2013) 56 Cal.4th 165, 193 (*Williams II*).) "[T]he existence of a plea agreement is relevant impeachment evidence that must be disclosed to the defense because it bears on the witness's credibility. [Citation.] Indeed, . . . 'when an accomplice testifies for the prosecution, full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness's credibility.' " (*People v. Fauber* (1992) 2 Cal.4th 792, 821 (*Fauber*).)

In *Williams I*, *supra*, 16 Cal.4th at p. 257, the California Supreme Court concluded "[t]here was no error in the prosecutor's faithfully recounting the nature of the prosecution's agreement with [the prosecution witness] as an aid to the jury's evaluation of his credibility." The Supreme Court explained that " '[p]rosecutorial assurances, *based on the record*, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper "vouching," which usually involves an attempt to bolster a witness by reference to facts *outside* the record.' [Citation.] No impermissible 'vouching' occurs where 'the prosecutor properly relie[s] on facts of record and the

inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief.' " (*Ibid.*) The *Frye* court similarly concluded the prosecutor's reading the precise terms of a prosecution witness's immunity agreement with the district attorney to the jury was not misconduct, in large part because "neither the phrasing nor the content of [the witness's] agreement to testify truthfully suggested a pretrial determination by the district attorney that [the witness] would be telling the truth, or otherwise portrayed the district attorney's office as privy to information bearing on [the witness's] veracity that was not admitted at trial." (*Frye, supra*, 18 Cal.4th at p. 971.)

The People contend Bolden forfeited his claims that the court should have redacted from Peterson's plea agreement references to the judge's making the ultimate determination whether Peterson testified truthfully and to Peterson's admission of gang allegations because he did not object below to the inclusion of those references. We agree Bolden's claim that Peterson's admission of gang allegations should have been redacted from the plea agreement is forfeited because Bolden did not raise that point below. (*People v. Eckstrom* (1986) 187 Cal.App.3d 323, 332 [failure to object to evidence below on the same ground as urged on appeal precludes appellate review of the issue]; *People v. Fierro* (1991) 1 Cal.4th 173, 211.) However, Bolden's objection on appeal to references to the judge's being the ultimate arbiter of Peterson's truthfulness is not forfeited because it is within the scope of his argument below that references in the plea agreement to Peterson's obligation to testify truthfully should have been redacted.

On the merits, we conclude that as in *Frye*, it was not improper vouching here to present the terms of Peterson's plea agreement to the jury because nothing in the plea

agreement or any of the references to it by counsel at trial "suggested a pretrial determination by the district attorney that [Peterson] would be telling the truth, or otherwise portrayed the district attorney's office as privy to information bearing on [Peterson's] veracity that was not admitted at trial." (*Frye, supra*, 18 Cal.4th at p. 971.) In the words of the California Supreme Court in *People v. Bonilla* (2007) 41 Cal.4th 313 (*Bonillo*), "The jury *might* [have] believe[d] the prosecutor thought [Peterson] was being truthful, but there is no reason to think it would have concluded the prosecutor had special information *outside the record* on which to base that belief, nor is there any reason to think this inference would have led the jury to conclude it no longer needed to evaluate [Peterson's] credibility for itself." (*Id.* at p. 337, fn. 9.) Peterson's plea agreement is a "fact of record" and, as noted, there is no improper vouching where 'the prosecutor properly relie[s] on facts of record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief.' " (*Williams I, supra*, 16 Cal.4th at p. 257.) Because Peterson was an accomplice testifying for the prosecution, full disclosure of his plea agreement was required to ensure that the jury had a complete picture of the factors affecting his credibility. (*Fauber, supra*, 2 Cal.4th at p. 821.)

We further conclude it was not improper vouching to disclose to the jury that the judge would determine whether Peterson had testified truthfully. In *Fauber*, the defendant contended the prosecutor's reading a prosecution witness's plea agreement to the jury constituted improper vouching for the witness's credibility because "the agreement told the jury that the prosecutor and the judge were making all necessary findings regarding [the witness's] credibility." (*Fauber, supra*, 2 Cal.4th at pp. 820-821.)

The *Fauber* court observed that any agreement bearing on a prosecution witness's credibility was required to be fully disclosed to the jury, and "it was crucial that the jury learn what would happen to [the witness] in the event he failed to testify truthfully in defendant's trial. But the precise mechanism whereby his truthfulness would be determined was not a matter for its concern." (*Id.* at p. 823.) The *Fauber* court stated that "[t]he provision detailing the judge's determination of [the witness's] credibility . . . arguably carried some slight potential for jury confusion, in that it did not *explicitly* state what is implicit within it: that the need for such a determination would arise, if at all, in connection with [the witness's] sentencing, not in the process of trying defendant's guilt or innocence. For these reasons, had defendant objected to its admission, the trial court would have acted correctly in excluding it [as irrelevant]." (*Ibid.*)

Unlike in *Fauber*, there was no risk here that Peterson's plea agreement would confuse the jury as to whether the judge would determine Peterson's credibility in connection with the guilt phase of his trial or in connection with sentencing. As noted, the plea agreement stated: "Peterson also understands that if the Judge determines that [his] testimony was not complete or truthful, [he] will receive the commitment to state prison for fifteen years (15) plus fifty years to life (50-life)." Thus, Peterson's plea agreement explicitly stated what was implicit in the plea agreement in *Fauber*—that the judge's determination of his credibility would be in connection with sentencing.

The above-quoted language in *Roberts* on which Bolden and Wildman rely in claiming improper vouching for Peterson's credibility is not persuasive in light of settled



California case law "that making a record of the terms of a plea agreement requiring a witness to tell the truth does not constitute impermissible vouching." (*Williams II, supra*, 56 Cal.4th at p. 193.) The quoted language in *Roberts* is dictum because the court was merely giving "guidance" to the trial court on remand.<sup>8</sup> More important, the improper vouching at issue in *Roberts* was based on evidence that was not in the record. The prosecutor argued that the jury could believe a prosecution witness because a police detective who did not testify, but was present in court, was there to assure the witness carried out his plea agreement and testified truthfully. (*Roberts, supra*, 618 F.2d at pp. 533-534.) The *Roberts* court observed that "[t]he jury could naturally believe that [the detective] had personal knowledge of relevant facts and was satisfied that these facts were accurately stated by [the witness]. In effect, the prosecutor was telling the jury that another witness could have been called to support [the witness's] testimony. This was error." (*Id.* at p. 534.) Vouching based on such evidence outside the record would be error under California law as well, but that type of improper vouching did not happen in the present case. The court did not err in refusing to redact portions of Peterson's plea agreement.

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<sup>8</sup> The *Roberts* court stated: "In the event of a retrial, the district court may benefit from some guidance concerning . . . introduction in evidence of the entire plea agreement and prosecutorial use of the promise to testify truthfully." (*Roberts, supra*, 618 F.2d at p. 535.

## II. WILDMAN'S APPEAL

### A. *Corroboration of Accomplice Testimony*

Wildman contends there was insufficient evidence corroborating the testimony of accomplices Peterson and Hay to support any of her convictions or true findings on the gang enhancement allegations against her. We disagree.

#### Legal Principles and Analysis

"The law requiring corroboration of accomplice testimony is well established." (*Rodrigues, supra*, 8 Cal.4th at p. 1128.) Section 1111 provides in part: "A conviction can not [*sic*] be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

" ' "Corroborating evidence 'must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.' [Citation.]" ' " (*Rodrigues, supra*, 8 Cal.4th at p. 1128.) "[F]or the jury to rely on an accomplice's testimony about the circumstances of an offense, it must find evidence that ' "without aid from the accomplice's testimony, tend[s] to connect the defendant with the crime." ' " (*People v. Romero and Self* (2015) 62 Cal.4th 1, 32 (*Romero*).) "The testimony of one accomplice cannot serve to corroborate that of another [citation]." (*People v. Jehl* (1957) 150 Cal.App.2d 665, 668.)

" ' "The requisite corroboration may be established entirely by circumstantial evidence. [Citations.] Such evidence 'may be slight and entitled to little consideration when standing alone. [Citations.]' " ' " (*Rodrigues, supra*, 8 Cal.4th at p. 1128.) " 'The entire conduct of the parties, their relationship, acts, and conduct may be taken into consideration by the trier of fact in determining the sufficiency of the corroboration.' " (*Romero, supra*, 62 Cal.4th at p. 32.) "The evidence 'need not independently establish the identity of the victim's assailant' [citation], nor corroborate every fact to which the accomplice testifies . . . ." (*Ibid.*) "The necessary corroborative evidence for accomplice testimony can be a defendant's own admissions." (*People v. Williams* (1997) 16 Cal.4th 635, 680 (*Williams III*).) A defendant's false or misleading statements made to authorities may also constitute corroborating evidence. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1022 (*Vu*).) Corroborating evidence is sufficient if it connects the defendant to the crime in a way that satisfies the jury that the accomplice is telling the truth. (*People v. Pedroza* (2014) 231 Cal.App.4th 635, 651 (*Pedroza*).)

" 'The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime.' " (*Romero, supra*, 62 Cal.4th at pp. 32-33, fn. omitted.) Once the trier of fact links a defendant to a charged crime based on sufficient corroborating evidence independent of an accomplice's testimony, it is free to accept all of the accomplice's testimony. (*People v. Davis* (2005) 36 Cal.4th 510, 544 (*Davis*).)

The trial court instructed the jury, without objection, that Peterson and Hay were accomplices to the crimes of murder, attempted robbery, and robbery if the jury found the crimes were committed. Thus, for the jury to rely on Peterson's or Hay's trial testimony about the circumstances of the charged robberies, attempted robbery, and murder, it had to conclude that evidence independent of Peterson's and Hay's testimony linked Wildman to those crimes. (*Davis, supra*, 36 Cal.4th at p. 543.) We conclude there was sufficient independent evidence to corroborate Peterson's and Hay's accomplice testimony regarding Wildman's participation in the charged crimes.

Deputy Fidler's testimony about what Dangerfield told him shortly after he was robbed corroborates Peterson's trial testimony. Dangerfield told Fidler that one of the robbers exited the Explorer from the front passenger door and the other exited from the rear passenger door. Dangerfield also told Fidler that the short, stocky man pulled a black revolver from his waistband and pointed it at Dangerfield's group. Thus, Dangerfield's statements shortly after the robbery corroborate Peterson's testimony that Wildman drove him and Bolden from Teazers to Denny's, that he and Bolden were sitting on the passenger side of Wildman's vehicle, and that Bolden pulled a black gun from his waistband after exiting the vehicle. In addition, about a week after the robbery, Dangerfield told Sergeant Janowicz that the gun used in the robbery was a black, long-nosed revolver, which further corroborates Peterson's testimony about the gun. Peterson's testimony that the gun Bolden used was a revolver was also corroborated by the testimony of a detective that a revolver does not expel shell casings when it is fired,

unlike a semiautomatic weapon, and the fact that no shell casings were found at the scene of the murder.

As noted, a defendant's own statements and admissions to authorities can provide the necessary corroborative evidence for accomplice testimony. (*Williams III, supra*, 16 Cal.4th at p. 680; *Vu, supra*, 143 Cal.App.4th at p. 1022.) The jury heard and was provided transcripts of Wildman's interview with detectives on May 15, 2013, during which she made a number of statements and admissions that corroborated testimony and statements to the police by Peterson and Hay.

Peterson testified that Wildman drove him, Hay, and Bolden to Teazers in her black SUV, and drove the group from Teazers to Denny's, where he and Bolden committed the robberies. Peterson testified that Wildman then drove the group to the Wells Fargo where the attempted robbery and murder of Duane M. occurred. Peterson testified that he and Bolden got out of Wildman's vehicle at the bank, he saw that Bolden was holding the gun that he used to commit the robberies at Denny's, and he heard shots fired after Bolden walked out of his sight. He and Bolden reentered the vehicle and Wildman drove away fast.

Sargent Janowicz testified that he interviewed Hay on May 28, 2013. After changing her story several times, Hay ultimately told Janowicz that Wildman drove her, Peterson, and Bolden to Teazers and Denny's on the night of the crimes, then drove the group from Denny's to a parking lot where Peterson and Bolden exited and reentered the vehicle, and drove the group away from that location. She told Janowicz that Wildman dropped her, Bolden and Peterson off at her (Hay's) apartment.

In her May 15, 2013 interview with detectives, Wildman stated that on the night of the crimes she drove to Teazers and later to Denny's with Hay, and then drove from Denny's to the Wells Fargo bank with Hay, Bolden, and Peterson. Her description of where everyone was sitting in her vehicle matched Peterson's. She told the detectives that Bolden and Peterson got out of her vehicle at the bank and she heard shots after they exited. Bolden and Peterson ran back to the vehicle, got into the vehicle, and she said, "Let's get the fuck out of here." She then drove away from the scene and dropped Hay, Bolden, and Peterson off at Hay's apartment.

These statements by Wildman corroborated Peterson's trial testimony and Hay's statements to the police and linked Wildman to the subject crimes. The evidence that Wildman drove Bolden and Peterson to the two crime scenes, was in her vehicle at the scenes when the crimes were committed, and drove Bolden and Peterson away from the scenes immediately after the crimes were committed supports a reasonable inference that she was an aider and abettor or participant in a conspiracy to commit robberies and is sufficient alone to corroborate Peterson's and Hay's testimony regarding the crimes. Although the corroborating evidence linking Wildman to the crimes is circumstantial and may be insufficient standing alone to establish every element of the charged offenses or the precise facts to which Peterson testified (e.g., that Wildman directed the robberies and attempted robbery), it sufficiently connected Wildman to the charged crimes for the jury to reasonably conclude that Peterson was telling the truth. (*Pedroza, supra*, 231 Cal.App.4th at p. 651.) Once the jury linked Wildman to the charged crimes based on

sufficient corroborating evidence that was independent of Peterson's testimony, it was free to accept all of Peterson's testimony. (*Davis, supra*, 36 Cal.4th at p. 544.)

B. *Prosecutor's Closing Argument Regarding Corroboration of Accomplice Testimony*

Wildman contends the prosecutor engaged in prejudicial misconduct by misstating the law regarding corroboration of accomplice testimony. Specifically, she contends the prosecutor improperly argued that Peterson's and Hay's testimony or statements were corroborated by doing a side-by-side comparison of their statements, effectively telling the jury that the statements of one accomplice can corroborate the statements of another accomplice.

Legal Principles and Analysis

"Under the federal Constitution, a prosecutor commits misconduct when his or her conduct 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citation.] Under California law, a prosecutor commits reversible misconduct when 'he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted.'

[Citation.] To preserve a claim of prosecutorial misconduct on appeal, 'the defense must make a timely objection at trial and request an admonition . . . .' " (*People v. Clark* (2016) 63 Cal.4th 522, 576-577.) However, " '[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit

the issue for appeal if " 'an admonition would not have cured the harm caused by the misconduct.' " ' ' " (*People v. Boyette* (2002) 29 Cal.4th 381, 432.)

Wildman's claim of prosecutorial misconduct "fail[s] at the threshold because [she] did not object to the [prosecutor's] supposed[ly] improper comments at trial and has advanced no persuasive reason why an objection or request for an admonition would have been futile." (*People v. Spencer* (2018) 5 Cal.5th 642, 683.) In any event, we conclude there was no prejudicial prosecutorial misconduct or error.

During his closing argument to Wildman's jury, the prosecutor reiterated instructions the court had given the jury regarding accomplice testimony, noting they applied to Peterson's and Hay's statements and that the jury would have the complete instructions in the jury deliberation room. He reminded the jury of the requirements that an "accomplice's statements or testimony [must be] supported by other evidence that you believe; that supporting evidence is independent of the accomplice's statements or testimony; and that supporting evidence tends to connect the defendant to the commission of the crimes." He noted that corroborating or "supporting evidence may be slight. It does not, by itself, need to be able to prove that the defendant is guilty[,] and "it does not need to support every fact about which the witness testified."

The prosecutor then discussed how statements and testimony from robbery victims Washington and Dangerfield and the lack of shell casings at the murder scene corroborated Peterson's testimony about the robberies and use of a revolver in the commission of the crimes. Wildman's claim of prosecutorial error is based on the way the prosecutor next addressed Hay's and Peterson's testimony and statements to the



police. The prosecutor began to discuss how Peterson's testimony "lines up with some of the evidence that we have." Although he noted that Hay told the police Wildman "had set Mr. Bolden and Mr. Peterson up to do a robbery," which was consistent with Peterson's testimony, he immediately told the jury that Hay's statement was corroborated by the evidence of "the two males getting out of a black SUV [and] committing a robbery." Thus, he corroborated Hay's statement with evidence other than Peterson's testimony; he did not say that Hay's statement was corroborated by Peterson testimony.

The prosecutor then noted that Hay's statement about getting into an argument with Harts during the ride in Wildman's vehicle was corroborated by Harts's testimony that "described getting into an argument with her." The prosecutor noted Hay's statements that Bolden was upset when he got home were corroborated by her property manager's testimony that she heard Hay's and Bolden's voices and other noise coming from Hay's apartment that night, and she heard Hay trying to calm down Bolden. The prosecutor further noted that damage to walls or doors in Hay's apartment corroborated statements Hay made to the police about property damage Bolden inflicted that night.<sup>9</sup> The prosecutor additionally noted Hay's statements were corroborated by Wildman's statements to police that Hay called her after she dropped Hay off at her apartment and told her about Bolden's violent, destructive behavior.

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<sup>9</sup> Hay told Janowicz that Bolden was hard to control when he got angry, and that on the morning of October 7, 2012, he was angry and punched holes in the doors of the apartment and broke a window by punching it.

The prosecutor then said, "So you do have supporting evidence for a lot of what Mr. Peterson said, and there's even more, and we're gonna go through it. [¶] So I just want to compare what Mr. Peterson said [to] what Miss Hay said." The prosecutor's ensuing brief comparison of statements by Peterson and Hay is the main basis for Wildman's claim of prosecutorial misconduct. To the extent the prosecutor's comparison constituted error, we conclude the error was harmless because the few comparisons he made were corroborated by Wildman's own statements to the police. The prosecutor noted both Peterson and Hay stated that Wildman, Hay, Bolden, and Peterson went to Teazers after Bolden's birthday party and that Wildman drove. Wildman told detectives that she drove to Teazers with Hay after Bolden's birthday party and later drove from Denny's to the Wells Fargo where Duane M. was murdered with Hay, Bolden, Peterson. The prosecutor then noted that Hay said "they go to Denny's after Teazers," but did not say there had been a robbery there, "[n]ot surprisingly because that's what her son did." Wildman's statements to the detectives corroborated that she and Hay drove to Denny's from Teazers, and the prosecutor obviously was not attempting to corroborate Peterson's testimony about the robberies committed at Denny's with Hay's failure to provide any corroborating statements about the robberies.

The prosecutor then stated that "they" (Wildman, Hay, Bolden, and Peterson) went to Wells Fargo, a fact that Wildman corroborated, as noted *ante*. The prosecutor mentioned Hay's description of the group's going to "a second location, and Mr. Bolden and Mr. Peterson getting out of Miss Wildman's vehicle." As noted above, Wildman's statements to the police corroborated that the group went to Wells Fargo and that Bolden

and Peterson exited her vehicle there. The prosecutor stated, "Then the attempted robbery occurs at Wells Fargo, and [Duane M.] is shot." He did not cite any evidence supporting or corroborating that assertion; he simply noted that Hay denied any knowledge of what happened at Wells Fargo while Peterson and Bolden were outside Wildman's vehicle.

The prosecutor next stated, "Then Mr. Peterson, he insisted that Miss Wildman made them commit the robberies. Miss Wildman was said to have set them up to do a lick, and what did Miss Hay say?" The prosecutor left that question unanswered, but it presumably was a reference to Hay's statement to Janowicz that Wildman "made them go do a lick." He next stated, "So Mr. Peterson admittedly lied to protect himself and Mr. Bolden, his cousin, initially. [¶] Miss Hay lied a number of times, and a number of times up here both prior to getting on the stand and being on the stand." The prosecutor did not make any further comparison of Peterson's and Hay's statements.

We conclude the prosecutor's brief comparison of similar statements by Peterson and Hays did not rise to the level of prosecutorial misconduct. As noted, just before the prosecutor mentioned similar statements that Peterson and Hay made, he reminded the jury of the instructions the court had given regarding the need for evidence independent of an accomplice's statements or testimony that connected Wildman to the commission of the crimes. The prosecutor effectively invited the jury to consider the court's complete instructions regarding accomplice testimony by informing them that they would have the complete instructions in the jury room. The prosecutor then only briefly compared Peterson's and Hay's statements and quickly moved on to other issues. He did not tell

the jury that Peterson's and Hay's similar statements could be used to corroborate the other's statements. Considered in context, the prosecutor's comments about similarities in Peterson's and Hay's statements could reasonably be viewed as references to common points of their stories that required corroboration by independent evidence.

We further conclude it is not reasonably probable that Wildman would have obtained a more favorable outcome had the prosecutor not noted the similarities between Peterson's and Hay's statements. Prosecutorial misconduct in misstating or erroneously characterizing the law is generally rendered harmless by proper instruction on the relevant law. (*People v. Montiel* (1993) 5 Cal.4th 877, 937.) "Arguments by counsel 'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, [citation], and are likely viewed as the statements of advocates; the latter . . . are viewed as definitive and binding statements of the law.'" (*People v. McDowell* (2012) 54 Cal.4th 395, 438.)

Here, the court's instructions rendered the alleged prosecutorial misconduct harmless because the court specifically instructed the jury that "[t]he evidence needed to support the statements or testimony of one accomplice cannot be provided by the testimony of another accomplice." The court also instructed the jury that it must follow the law as explained by the court; that if the attorneys' comments on the law conflicted with the court's instructions, it had to follow the instructions; and that "[n]othing that the attorneys say is evidence." (CALCRIM Nos. 200, 222.) We presume the jury relied on the instructions and not the arguments of counsel in rendering its verdict. (*People v.*

*Morales* (2001) 25 Cal.4th 34, 47; *People v. Boyette* (2002) 29 Cal.4th 381, 436; *People v. Najera* (2006) 138 Cal.App.4th 212, 224.) Because we conclude there is no reasonable likelihood the prosecutor's alleged misconduct or error misled the jury to Wildman's prejudice, it is not a basis for reversal.

C. *Sufficiency of the Evidence to Support the Gang Enhancement Finding*

Analysis

As we discussed *ante*, there was sufficient evidence to support Bolden jury's gang enhancement findings as to the Denny's robberies. We conclude the Wildman jury could reasonably find that because attempted robbery and murder at the Wells Fargo bank occurred shortly after the Denny's robberies and were part of a continuing crime spree, they were committed by Bolden for the benefit or in association with the gang as much as the preceding robberies at Denny's. We further conclude there was sufficient evidence to support the Wildman jury's gang enhancement findings against Wildman.

As noted the gang sentencing enhancement under section 186.22, subdivision (b)(1) applies to "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]" Substantial evidence supports a finding that Wildman aided and abetted Bolden and Peterson in the commission the subject crimes with knowledge that she was associating with gang members.

Wildman attended the barbecue birthday party for Bolden the night the crimes were committed. The evidence at trial included photographs taken of Bolden and

Peterson throwing gang signs at that party and Peterson testified that he hung out with the Rolling 60's Neighborhood Crips. In her police interview on May 15, 2013, Wildman initially denied attending the barbecue, stating she did not go because she heard it would be attended by people from Inglewood and she knew "they're gang bangers." She later stated that Hay had told her Bolden was "a Crip" in Los Angeles and that Hay and Bolden had moved to Victorville because Bolden "had gotten himself in some trouble[.]" Wildman added that Bolden "always wears a stupid rag on his head." When asked to describe the rag, she said she thought it was blue and that her boyfriend said it was "Crip." Based on this evidence, the jury could reasonably find Wildman knew she was associating with gang members when she aided and abetted the subject crimes.

In any event, the first prong of the gang sentencing enhancement under section 186.22, subdivision (b)(1) is satisfied as to Wildman even if she did not know she was associating with gang members when she aided and abetted the subject crimes. The first prong requires "a felony committed for the benefit of, at the direction of, or in association with any criminal street gang," The passive voice phrasing of the first prong means that the felony of which the defendant is convicted must have been committed by someone for the benefit of, at the direction of, or in association with a criminal street gang to satisfy the first prong of the enhancement; however, the defendant need not have been the person who committed the felony for the benefit of, at the direction of, or in association with a gang. When a defendant, like Wildman in the present case, is not the direct perpetrator of the subject crime but rather aids and abets the crime or is a member of a conspiracy to commit the crime, the first prong may be satisfied by a direct perpetrator who acted for

the benefit of, at the direction of, or in association with a criminal street gang. Because Bolden satisfied the first prong of section 186.22, subdivision (b)(1), all that is required for Wildman to be subject to the gang enhancement under that subdivision is that she had the requisite intent to satisfy the subdivision's second prong—i.e., that she committed "the gang-related felony 'with the specific intent to promote, further, or assist in any criminal conduct by gang members.' " (*Albillar, supra*, 51 Cal.4th at p. 64.)

As this court explained in *People v. Garcia* (2016) 244 Cal.App.4th 1349 (*Garcia*), "the enhancements alleged under section 186.22, subdivision (b) do not require a showing that defendant[] . . . *knew* [she was] assisting gang members. Rather, by its terms, the only mens rea required to establish the gang enhancement is proof of an intent to promote, further or assist a crime or crimes committed by gang members. [¶] In this sense, the enhancement set forth in section 186.22, subdivision (b), which requires proof that an underlying crime was related to gang activity and proof of an intent to assist in committing the crime, is to be distinguished from the substantive crime of active gang participation, proscribed by section 186.22, subdivision (a), which by its terms requires *knowledge* by a defendant that he or she has been assisting the criminal conduct of a gang with a pattern of street crime." (*Id.* at p. 1362, original italics.) Because there was substantial evidence that Wildman had the specific intent to assist in crimes committed by Bolden and that Bolden was a gang member and satisfied the first prong of section

186.22, subdivision (b)(1), the jury reasonably made true findings on the gang enhancement allegations against Wildman.<sup>10</sup>

D. *Flight Instruction*

The court instructed both juries with CALCRIM No. 372 as follows: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he or she was aware of his or her guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

Wildman contends the court erred by giving the flight instruction because there was insufficient evidence that her driving away from the scene of the attempted robbery and murder was motivated by a desire to avoid detection or apprehension for the murder. Bolden joins in this contention. We conclude there was sufficient evidence to support the flight instruction as to Wildman and Bolden.

" 'In general, a flight instruction "is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt." ' [Citations.] Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest 'a purpose to avoid being observed or arrested.' [Citations.] To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid

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<sup>10</sup> In light of our conclusion that the evidence sufficiently supports jury's gang enhancement findings against Wildman, we reject her contention that the court prejudicially erred in admitting gang evidence.



arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*Bonilla, supra*, 41 Cal.4th at p. 328.)

There was sufficient evidence to support giving both juries a flight instruction. There is no dispute that Wildman left the scene immediately after the murder. Peterson testified that immediately after Bolden fired shots at the murder scene, he and Bolden ran back to Wildman's vehicle and entered it. According to Peterson, Bolden said he "messed up," and Wildman drove away from the bank at a fast speed. Peterson answered affirmatively when asked, "And as soon as you and Ronell Bolden returned and were in [Wildman's] car, you said that's when Valerie Wildman sped off." The jury also received evidence that Peterson told detectives "[e]veryone was screaming and yelling" while Wildman drove them home. Wildman told detectives that she heard shots fired after Bolden and Peterson got out of her vehicle at the bank, and that when Bolden and Peterson ran back to her vehicle and entered it, she said, "Let's get the fuck out of here." She then drove away.

As noted, to obtain a flight instruction, the prosecution is not required to prove the defendant fled—i.e., left the scene to avoid arrest; the instruction is properly given if there is evidence from which the jury could reasonably find the defendant fled the crime scene. (*Bonilla, supra*, 41 Cal.4th at p. 328.) Based on the evidence noted *ante*, the juries here could reasonably find that Bolden fled by running back to Wildman's vehicle after he shot Duane M., and the Wildman jury could reasonably find that Wildman was aware Bolden had shot Duane M. and departed from the scene to avoid being observed or

arrested. The court did not err by instructing the juries regarding flight under CALCRIM No. 372.

E. *Instruction Regarding Expert Testimony*

The court instructed both juries with CALCRIM No. 332 regarding expert opinion evidence as follows:

"Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

"An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion."

Wildman contends the court prejudicially erred by instructing the jury with CALCRIM No. 332. She argues that: (1) the portion of the instruction directing the jury that it "must decide whether information on which the expert relied was true and accurate" was held to be an incorrect statement of the law in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and *People v. Vega-Robles* (2017) 9 Cal.App.5th 382 (*Vega-Robles*); and (2) the instruction's direction to the jury that "[y]ou *may* disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence" (*italics*

added) is flawed because use of the word "may" allows the jury to consider an opinion even though it finds it to be unbelievable, unreasonable, or unsupported by the evidence. Wildman contends that because the instruction is an improper statement of the law, she did not forfeit her challenge to the instruction by failing to object to it below.

" 'A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial.' " (*People v. Moon* (2005) 37 Cal.4th 1, 25.) "Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) "The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law." (*People v. Posey* (2004) 32 Cal.4th 193, 218.) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

We reject Wildman's contention that under *Sanchez*, CALCRIM No. 332 includes an incorrect statement of law. In *Sanchez*, the California Supreme Court addressed the extent to which an expert witness may properly relate hearsay evidence as the basis for an expert opinion. The *Sanchez* court noted that "[t]he hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise. . . . Knowledge in a specialized area is what differentiates the expert from a lay witness, and makes his testimony uniquely valuable to the jury in explaining matters 'beyond the common experience of an ordinary juror.' [Citations.] As such, an expert's testimony

concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Sanchez, supra*, 63 Cal.4th at p. 676.)

"By contrast an expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried. Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge." (*Sanchez, supra*, 63 Cal.4th at p. 676.)

*Sanchez* thus "restore[d] the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Sanchez, supra*, 63 Cal.4th at p. 685.) *Sanchez* does not affect "the traditional latitude granted to experts to describe background information and knowledge in [their] area[s] of expertise." (*Ibid.*) However, when an "expert testifie[s] to case-specific facts based upon out-of-court statements and assert[s] those facts [are] true because he relied upon their truth in forming his opinion, he [is] reciting hearsay." (*Ibid.*)

Regarding CALCRIM No. 332, *Sanchez* noted a *potential* problem with its direction that the jury "must decide whether information on which the expert relied was true and accurate." The court noted that "[w]hen an expert is not testifying in the form of

a proper hypothetical question and *no other evidence of the case-specific facts presented has or will be admitted*, there is no denying that such facts are being considered by the expert, and offered to the jury, as true. Indeed, the jury here was given a standard instruction that it 'must decide whether information on which the expert relied was true and accurate.' (CALCRIM No. 332 [Expert Witness Testimony].) *Without independent competent proof* of those case-specific facts, the jury simply had no basis from which to draw such a conclusion." (*Sanchez, supra*, 63 Cal.4th at p. 684, italics added.)

The *Sanchez* court did not hold that CALCRIM No. 332 is an improper statement of the law that should never be given to a jury, as Wildman suggests. The *Sanchez* court merely noted that if a jury is presented only *hearsay* evidence of case-specific facts on which a testifying expert relies and is not presented independent competent proof of those facts, it has no ability to determine whether those facts are true and accurate. The *Sanchez* court's observation that a jury will be unable to meaningfully evaluate whether information relied on by an expert witness is true and accurate, when that information consists of or includes case-specific facts presented solely through hearsay, does not mean the instruction is improper where there *is* competent evidence to support the case-specific facts on which the expert relies, or where the expert's testimony, including hearsay, concerns the expert's general knowledge in his or her field of expertise and is not based on case-specific facts. Presumably, post-*Sanchez* trial courts will, on proper objection, exclude an expert's testimony regarding case-specific facts when such facts are supported only by hearsay statements and not by competent independent evidence. In cases where the expert does not rely on hearsay for his or her assertion of case-specific

facts, the problem with CALCRIM No. 332 noted in *Sanchez* is not present. As the *Vega-Robles* court noted, "To the extent [CALCRIM No. 332] required the jury to evaluate the expert's testimony, *unmoored from the admissible evidence that supported the expert's opinion*, it runs afoul of *Sanchez*." (*Vega-Robles, supra*, 9 Cal.App.5th at p. 416.) Conversely, to the extent CALCRIM No. 332 requires the jury to evaluate the truth and accuracy of expert testimony that is supported by admissible evidence rather than hearsay, it does not run afoul of *Sanchez*.

Wildman does not point to any case-specific hearsay that gang expert Salsberry relied on in rendering an opinion. Salsberry's opinion about Bolden's gang membership and Peterson's gang association was based on competent evidence admitted in the case, such as specific items recovered from Bolden's residence, including a date book with "Rich Rolling 60's" written on the front, other writings containing gang references, a belt bearing gang abbreviations, and photographs showing Bolden and Peterson throwing gang signs and Bolden wearing blue. Because Salsberry's opinions were based on competent evidence and not hearsay, there was no CALCRIM No. 332/*Sanchez* error.

In her reply brief, Wildman notes that the People, in their respondent's brief, advanced a "new theory" that she is an associate of the Rolling 60's based on Salsberry's testimony that he learned from speaking to gang members that "it's not uncommon to have a Hispanic or a white Rolling 60's gang member if he grew up in the neighborhood." Wildman complains that *the People's new theory* uses case-specific hearsay. Wildman is mistaken. The statements that Salsberry referred to about Hispanic and white gang members were not case-specific hearsay; they concerned his general knowledge about the

Rolling 60's gang and were thus admissible under *Sanchez*. In any event, the fact that *the People* used those *non-case-specific* statements as basis for a case-specific factual argument *on appeal* is immaterial and does not render CALCRIM No. 332 an incorrect statement of the law to the jury at trial. The court's instruction with CALCRIM No. 332 was not improper in light of Salsberry's testimony.

Further, the *Sanchez* court was not solely focused on CALCRIM No. 332; it addressed jury confusion created by the trial court's additional instruction to the jury "that the gang expert's testimony concerning 'the statements by the defendant, police reports, [field identification] cards, STEP<sup>11</sup> notices, and speaking to other officers or gang members' should not be considered 'proof that the information contained in those statements was true.' " (*Sanchez, supra*, 63 Cal.4th at p. 684; CALCRIM No. 360.) The *Sanchez* court observed: "Jurors cannot logically follow these conflicting instructions. They cannot decide whether the information relied on by the expert 'was true and accurate' without considering whether the specific evidence identified by the instruction, and upon which the expert based his opinion, was also true. 'To admit basis testimony for the nonhearsay purpose of jury evaluation of the experts is . . . to ignore the reality that jury evaluation of the expert requires a direct assessment of the truth of the expert's basis.' " (*Sanchez, supra*, 63 Cal.4th at p. 684.) The juror confusion created by giving both CALCRIM No. 332 and CALCRIM No. 360 that concerned the *Sanchez* court was

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<sup>11</sup> The acronym STEP is a reference to the California Street Terrorism Enforcement and Prevention Act. (§ 186.20 et seq.) (*Sanchez, supra*, 63 Cal.4th at p. 672, fn. 3.)

not an issue in the present case because the trial court did not instruct either the Bolden or Wildman jury with CALCRIM No. 360.

Wildman also contends the language in CALCRIM No. 332 that instructs the jury that it "*may* disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence" (italics added) improperly allows the jury to consider an opinion that it finds unbelievable, unreasonable, or unsupported by the evidence. We do not view this language as misstating the law or creating a risk that juries will be misled to the prejudice of defendants. It is not reasonably likely that a reasonable jury would view the instruction that it "may disregard any opinion it find[s] unbelievable, unreasonable, or unsupported by the evidence," as an invitation to do the opposite—i.e., to credit and give weight to an opinion after finding it to be unbelievable, unreasonable, or unsupported by the evidence. The instruction merely informs the jury that it is not obligated to accept every expert opinion admitted at trial as valid, regardless how unbelievable, unreasonable, or unsupported by the evidence it may be. As the People note, the instruction accords with section 1127b, which provides that "[t]he jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. *The jury may, however, disregard any such opinion if it shall be found by them to be unreasonable.* [¶] No further instruction on the subject of opinion evidence need be given." (Italics added.) The court did not err in instructing the juries with CALCRIM No. 332.



F. *Defense Counsel's Stipulation to Admit Wildman's Second and Third Police Interviews*

Wildman contends her trial counsel rendered ineffective assistance in stipulating to admit her second and third interviews with the police instead of seeking to exclude them as "fruit of the poisonous tree"<sup>12</sup> of her first unlawful police interview, which the parties stipulated to exclude. We conclude Wildman has not met her burden of establishing ineffective assistance of counsel.

Background

Wildman was interviewed by police on April 4, 2013, April 24, 2013, and May 15, 2013. She filed a motion in limine at trial to suppress involuntary coerced statements that she made during the April 4 interview and her "[s]ubsequently tainted interviews . . . on 4/24/13 and 5/15/13." The court held a hearing on the motion during which San Bernardino County Sheriff Sergeant John Bannes testified about his interview with Wildman on April 4, 2013 and his participation in the interviews on April 24 and May 15, 2013.

On April 4, 2013, Wildman was driving her black Ford Explorer and Bannes stopped her for speeding and an expired registration. An adult male, Julius Vaughn, and

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<sup>12</sup> "The fruit of the poisonous tree doctrine is an exclusionary rule that prohibits the introduction of evidence that is causally connected to an unlawful search [or coercive interrogation]. [Citation.] In the area of constitutional law, the fruit of the poisonous tree doctrine supplies an exclusionary rule that is designed to deter police misconduct. Application of the rule calls for a balancing of interests, including the public's interest in the effective prosecution of criminals. Because the rule exacts a toll on society, its application must be guided by its deterrent purposes and its use must bear some relation to its purposes." (*People v. Navarro* (2006) 138 Cal.App.4th 146, 157, fn. 6.)

Wildman's 14-year-old son were passengers in Wildman's vehicle when Bannes stopped it. Wildman gave Bannes her license, vehicle registration, and certificate of title, which was in her possession because she had recently purchased the vehicle. Bannes maintained possession of the certificate of title because he wanted to verify its authenticity. Bannes told Wildman he would do that at the station, and asked Wildman if she would come to the station to speak with him about the vehicle. On cross-examination, Bannes testified that he told Wildman at the scene of the traffic stop that he wanted to talk to her at the station about her vehicle and its whereabouts in October 2012. He later testified that he first believed Wildman's vehicle was used in a crime in October 2012 after he returned to the station and checked the vehicle's records.

Bannes let Wildman leave the scene and she met Bannes at the Victorville Police Station later that day. Bannes verified that Wildman's certificate title was authentic and then questioned her for about four hours. Bannes referred to the questioning as "a casual conversation." He asked Wildman who had possession and control of her vehicle most of the time. He told her the vehicle had been used in an armed robbery at a local Denny's. Wildman confirmed that she owned the vehicle and was adamant that she was the only person who had access to it.

Wildman asked Bannes to return her certificate of title multiple times. Bannes explained that it was in the visor of his car and that he would get it and return it to her when they were done with their conversation. Bannes testified in court that Wildman was concerned about getting her "pink slip" back, and he explained to her that he "did not take her pink slip," he had her "title." He testified: "She accused me of keeping the

[vehicle's] pink slip. I did not have the pink slip. I had the certificate of title." However, Bannes acknowledged that a certificate of title was called a pink slip before 1998.

Bannes returned the certificate of title to Wildman at the end of the interview.

On April 24, 2013, what the parties refer to as the "second interview" occurred. However, what took place that day was not actually an interview, but a pretext call that Wildman made to Julius Vaughn. Bannes contacted Wildman and sent officers to bring her to the station, and she agreed to make the pretext call. The jury heard a recording and was provided a written transcript of the pretext call. During the call, Wildman unsuccessfully attempted to get Vaughn to admit that he drove her vehicle the night the charged crimes occurred and was involved in the crimes.

Wildman's "third interview" with detectives was the interview on May 15, 2013, mentioned *ante* in the discussion of evidence that corroborated Peterson's testimony. In that interview, Wildman told detectives that on the night of Bolden's birthday, she drove to Teazers with Hay and from there went to Denny's to get a cup of coffee because she was not feeling good. She drove to Denny's, parked, and went inside the restaurant to get coffee and use the bathroom. When she came out of the restaurant, "there was some commotion or whatnot" but she did not know what it was about. She had been in the restaurant about 10 to 15 minutes. When she returned to her vehicle, Bolden and Peterson were present, and Hay asked Wildman to give them a ride to the bank so Peterson could withdraw some money from an ATM. Wildman did not know a robbery had occurred while she was inside the restaurant.

As noted, Wildman told detectives that she drove to the Wells Fargo bank with Hay, Bolden, and Peterson, and that Bolden and Peterson got out of her vehicle at the bank and she heard shots after they exited. After Bolden and Peterson ran back to the vehicle, she drove away from the scene and dropped Hay, Bolden, and Peterson off at Hay's apartment. She repeatedly told the detectives throughout the interview that she did not see the shooting at Wells Fargo and did not see a gun or know that Bolden had a gun.

After Bannes testified at the hearing on Wildman's motion in limine, her counsel explained that he wanted Wildman's first interview with Bannes suppressed because Wildman in that interview denied being at Teazers or Denny's on the night of the charged robberies—facts she later admitted. Counsel stated he also wanted to suppress statements that Wildman was involved with gang members and then argued that because the first interview was coerced, "everything from that interview should be suppressed." The court expressed concern that Bannes's retention of Wildman's personal property (certificate of title) constituted a detention of Wildman or a seizure of her property. The court asked the prosecutor if the People's position was that Wildman was not detained because she went to the station "on her own accord, and she was there at the invitation of Sergeant Bannes[.]" The prosecutor replied, "That's the People's position."

Wildman's counsel argued that making Wildman come to the sheriff's station to retrieve property that was "stolen from her and taken back to the station" constituted a "prolonged detention." The court stated, "The issue is whether or not the current law would support [the] position that a reasonable person would not feel free to leave a police station with [the police] holding their certificate of title, and that's the issue." The

prosecutor and counsel for Wildman both agreed the court had correctly articulated the issue. The court stated it needed authority on the issue and asked both attorneys if they had any case authority addressing it. Neither did.

The court later stated, "The issue that I have here, the legal issue that I see . . . is whether a reasonable person would feel free to leave without their certificate of title, whether holding that title made that person feel that they were not free to leave. "And . . . if a reasonable person felt like they were not free to leave, then that's a detention." The prosecutor argued that Bannes's holding Wildman's certificate of title did not constitute coercion, as Wildman's counsel had contended.

The court asked Wildman's counsel, "Would you agree that the legal definition of coercion is overcoming a person's will?" Counsel agreed. The court then noted the prosecutor's argument that Wildman had other options when Bannes was holding her certificate of title at the station, such as reporting Bannes to his supervisors or going to the DMV to get a duplicate certificate of title. The court stated, "There are a lot of other options. Her actual will may not be a proper position, but that's why I don't see the coercion." Wildman's counsel responded, "I don't know." The court continued: "I'll look at that theory, but I'll tell you right now, I don't see where there's a coercion. But I do—for the legal issue is whether or not a person would feel free to leave a consensual conversation when one party has the other party's property." Counsel asked, "So, like, a prolong[ed] detention versus coercion?" The court replied, "Right."

After discussing some other matters with counsel, the court returned to Wildman's motion to suppress her police interviews and addressed the issue of whether the second

and third interviews were subject to suppression under the fruit of the poisonous tree doctrine. The court noted that Bannes's testimony indicated he knew that Wildman's "black Ford Explorer was somehow—or could have been connected [to] the two crimes we're addressing here." After the prosecutor acknowledged, "I think that was asked [today,]" the court continued: "And that would have been enough to have further contact in itself, so it wouldn't have mattered. But the [fruit of the] poisonous tree doctrine would have fallen apart because just knowing that that car itself had been involved in a crime would have been enough for him to have some contact with her, but [Bannes] actually said it was what Ms. Wildman told him in the course of those four hours [on April 4, 2013 that led to the subsequent interviews]. So that's how . . . I can see where the fruit of the poisonous tree [doctrine] may or may not be viable in this instance."

The court then asked the prosecutor what his position was on the applicability of the fruit of the poisonous tree doctrine. The prosecutor noted that what occurred on April 24, 2013 (the "second interview") was a pretextual phone call to Vaughn, and that "[t]here were no promises or compulsion or the like for her to come down on the 24th." He further noted that Detective Janowicz had interviewed Wildman on April 19, 2013, between the April 4 and April 24 interviews. Although the prosecutor did not expressly address the fruit of the poisonous tree doctrine, presumably, his position was that the April 24 pretextual call was not itself coerced and was not the result of Wildman's April 4 session with Bannes, but rather resulted from the April 19 interview, which Wildman did not challenge. The prosecutor noted the April 19 interview yielded "some information regarding [Wildman's] involvement with Ms. Hay and her family who she knows to be

gang members." He further noted that "[t]here was introduction of other officers dealing with Ms. Wildman certainly between the time of [Bannes's complained] of conduct and the 24th." The court informed counsel it would give them its ruling on Wildman's motion in limine before they made their opening statements.

Thus, the argument on Wildman's in limine motion ended with the court's expressing doubt that Bannes's retention of Wildman's certificate of title constituted coercion, and wanting the parties to provide case authority on the issue of whether the retention resulted in a detention. The court also expressed doubt about the applicability of the fruit of the poisonous tree doctrine to Wildman's second (April 24) and third (May 15) interviews in light of Bannes's knowledge when he questioned Wildman on April 4 that her vehicle was involved in the subject crimes.

The next day, the prosecutor informed the court there would be a stipulation regarding Wildman's motion in limine. Wildman's counsel informed the court he would withdraw his motion based on the stipulation. The stipulation was to exclude Wildman's April 4, 2013 interview with Bannes and to allow Janowicz to testify about his April 19, 2013 interview with Wildman. The parties further stipulated that Wildman's April 24, 2013 pretextual call to Vaughn, in the prosecutor's words, would be admitted "subject to [an Evidence Code section] 402 hearing as to the pretextual call itself. But as far as anything outside of that, in regard to the pretext call, we're stipulating it can come in."

The parties also stipulated that Bannes's May 15, 2013 contact with Wildman would be admissible in part. The prosecutor stated that "the 5-15-13 contact by Sergeant Bannes can come in; however, when she was confronted as a liar, if it is in regard to what

she told him on [April] 4th, then we're going to be excluding it. If that is in regard to anything else, then we're going to let it in." The parties agreed that Wildman's transcribed interview with Janowicz on May 15, 2013 would be admitted.

### Legal Principles and Analysis

The burden of proving a claim of ineffective assistance of counsel is on the appellant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) To establish a prima facie case of ineffective assistance of counsel, the defendant must show (1) his or her counsel performed at a level below an objective standard of reasonableness under prevailing professional norms, and (2) he or she was prejudiced as a result of counsel's deficient performance. (*People v. Hamilton* (1988) 45 Cal.3d 351, 377.) The prejudice component is satisfied if the defendant shows there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.) Since the failure of either component is fatal to establishing ineffective assistance of counsel, it is unnecessary "to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*People v. Cox* (1991) 53 Cal.3d 618, 656, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 697.)

" 'When a defendant on appeal makes a claim that his [or her] counsel was ineffective, the appellate court must consider whether the record contains any explanation



for the challenged aspects of representation provided by counsel. "If the record sheds no light on why counsel acted or failed to act in the manner challenged, 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' [citation], the contention must be rejected." ' ' ' (*People v. Samayoa* (1997) 15 Cal.4th 795, 845.) We presume there was a reasonable tactical basis for counsel's challenged decision unless the record affirmatively demonstrates otherwise. (*People v. Lucas* (1995) 12 Cal.4th 415, 443.)

We conclude that Wildman has not satisfied either prong of her ineffective assistance claim because the record shows a satisfactory explanation for Wildman's trial counsel's stipulating to admit her second and third interviews with the police instead of seeking to exclude them, and it is not reasonably probable that she would have obtained a better result at trial if her trial counsel had sought to exclude the second and third interviews.

Wildman's counsel had a reasonable tactical basis to stipulate to exclude the first interview, in which Wildman denied being at Teazers or Denny's on the night of the charged robberies and admitted dating two different suspected gang members. Her denial of critical facts in the first interview that she later admitted to police and evidence of her involvement with suspected gang members likely would have caused the jury to view her in an unfavorable light.

Counsel's stipulation to admit the third police interview was reasonable because that interview presented Wildman's version of the facts surrounding the charged crimes. Wildman insisted throughout the third interview that she was unaware the crimes were

being committed when they were being committed, thus providing the jury a factual scenario under which she was innocent of the charges. Absent the third interview, the jury would have been presented only Peterson's and Hay's incriminating statements about Wildman's involvement in the crimes and the corroborating evidence that Wildman drove perpetrators Bolden and Peterson to and from the crime scenes.

Although Wildman in her "second interview" (the pretextual phone call to Vaughn) appeared to be trying to implicate Vaughn in the charged crimes, nothing in the pretextual interview directly implicated Wildman in the crimes. Counsel reasonably could have made the tactical decision that it was worth stipulating to admit the second interview, despite the risk it could cast Wildman in an unfavorable light, in order to get Wildman's third interview admitted into evidence and the damaging first interview excluded from evidence.

Further, the court appeared inclined to rule that the first interview was not coerced, which would have precluded exclusion of the second and third interviews as fruit of the poisonous tree of the first interview. At the end of the hearing on Wildman's motion in limine, the trial court indicated it was not inclined to view Wildman's first interview with Bannes as involving or being the result of coercion, but the court was seriously considering whether Bannes's delay in returning Wildman's certificate of title constituted a detention. If the trial court had decided Wildman was *detained* in the first interview such that she should have been given *Miranda* warnings, but her statements to Bannes were not *coerced*, the fruit of the poisonous tree doctrine would not apply to the second and third interviews, because the fruit of the poisonous tree doctrine does not apply to

*Miranda* violations (*Or. v. Elstad* (1985) 470 U.S. 298, 303-305.) The accused must show "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will" if later statements are to be inadmissible. (*Id.* at p. 309.)

Thus, considering that the court was not likely to exclude the second and third interviews as fruit of the poisonous tree of the first interview, and it was unknown whether the court would even exclude the first interview, counsel could reasonably decide to ensure that the damaging first interview would be excluded by stipulating to its exclusion and the admission of the other two interviews rather than gamble that all three interviews would be presented to the jury.

Wildman has not satisfied the prejudice prong of her ineffective assistance claim because she has not shown there was a reasonable probability that but for her counsel's alleged error in stipulating to the admission of her second and third police interviews, she would have obtained a more favorable outcome at trial. Specifically, it is not reasonably probable that counsel would have succeeded in suppressing the second and third interviews under the fruit of the poisonous tree doctrine because the court reasonably surmised that Wildman inevitably would have been contacted and questioned by law enforcement even if Bannes had not stopped her and improperly questioned her during the first interview. There is an inevitable discovery exception to the fruit of the poisonous tree doctrine that "allows admission of evidence where the court finds that challenged evidence would have been eventually secured through legal means regardless of improper official conduct." (*People v. Tye* (1984) 160 Cal.App.3d 796, 800.) Bannes told Wildman during the first interview that her vehicle had been used in an armed

robbery at Denny's, which showed the police knew her vehicle was involved in the crimes independently of anything Wildman said during the first interview.

At the hearing on Wildman's motion in limine, the trial court observed that law enforcement's knowledge, at the time of the first interview, that Wildman's vehicle was connected to the crimes would inevitably have led police to contact and question Wildman and rendered the fruit of the poisonous tree doctrine inapplicable, although the court speculated the doctrine might nevertheless apply because Bannes testified to the effect that the later police interviews of Wildman occurred because of statements she made in the allegedly unlawful first interview. However, Bannes testimony that Wildman's statements in the first interview led to subsequent interviews does not change the fact that he knew Wildman's vehicle was connected to the charged crimes before or at the beginning of his first interview with Wildman. That fact renders the inevitable discovery exception to the fruit of the poisonous tree doctrine applicable and establishes that Wildman was not prejudiced by her trial counsel's stipulation to admit Wildman's second and third police interviews. Considering that the police knew Wildman's vehicle was involved in the crimes and that they inevitably would have contacted her and questioned her regardless of Bannes's first interview, it is not reasonably probable that the trial court would have excluded the second and third interviews under the fruit of the poisonous tree doctrine had Wildman's counsel continued to seek their exclusion rather than stipulate to their admission.

Even if Wildman's counsel had succeeded in suppressing all of Wildman's police interviews, considering Peterson's and Hay's testimony and statements to the police and

the corroborating evidence that Wildman was the driver of the vehicle involved in the subject crimes, it is not reasonably probable that Wildman would have obtained a more favorable outcome at trial as a result of suppression of the interviews. As noted *ante*, suppression of the third interview stood to harm Wildman more than help her because its suppression would have deprived the jury of her version of the facts, under which she was innocent of any crime. Wildman has not met her burden of showing that her trial counsel rendered ineffective assistance in stipulating to admit her second and third interviews with the police instead of seeking to exclude them under the fruit of the poisonous tree doctrine.<sup>13</sup>

### III. PETITION FOR REHEARING REGARDING FIREARM ENHANCEMENTS

After we filed an unpublished opinion affirming the judgments, Bolden filed a petition for rehearing asking us to remand the matter to the trial court to determine whether to strike the firearm enhancements it imposed under section 12022.53. Wildman joined in the petition.

The court sentenced Bolden to an indeterminate prison term of 50 years to life and a determinate term of 29 years four months as follows: On count 1 (murder), the court sentenced Bolden to 25 years to life, consecutive to the sentence on count 5 (robbery), plus a consecutive term of 25 years to life on the firearm enhancement under section 12022.53, subdivision (d). The court stayed sentences on other firearm enhancements on

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<sup>13</sup> Wildman's contention that the court prejudicially erred by refusing to redact Peterson's promise to testify truthfully from his plea agreement is addressed *ante* in section C of our discussion of Bolden's appeal.

count 1 under section 1170.1, subdivision (f).<sup>14</sup> The court stayed the sentence on count 2 (attempted robbery of the murder victim) under section 654 and stayed sentences on all of the firearm enhancements under count 2 under section 1170.1, subdivision (f). On count 5, the court sentenced Bolden to five years plus a consecutive term of 10 years for the gang enhancement under section 186.22, subdivision (b)(1)(C), and a consecutive term of 10 years for use of a firearm under section 12022.53, subdivision (b). On count 6 (robbery), the court sentenced Bolden to one year, consecutive to the sentence on count 5, plus a consecutive term of three years four months on the firearm enhancement under section 12022.53, subdivision (b). The court stayed the sentence for the gang enhancement on count 6 under section 186.22, subdivision (b)(1)(C).

The court sentenced Wildman to an indeterminate term of 50 years to life and a determinate prison term of 26 years as follows: On count 1 (murder), the court sentenced Wildman to 25 years to life, consecutive to the sentence on count 5 (robbery), plus a consecutive term of 25 years to life on the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1).<sup>15</sup> The court stayed sentences on other firearm enhancements under count 1 under section 654, and stayed sentence on a section 186.22 gang

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<sup>14</sup> Where the sentencing minute order for Bolden specifies a sentencing stay under section 1170.1, subdivision (f), the court orally specified a stay under both subdivision (f) and subdivision (g) of section 1170.1.

<sup>15</sup> Subdivision (e)(1) of section 12022.53 provides: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

enhancement under section 12022.53, subdivision (f). The court stayed the sentence on count 2 (attempted robbery of the murder victim) and sentences on the gang enhancement and firearm enhancements on count 2 under section 654. On count 5, the court sentenced Wildman to five years plus a consecutive term of 10 years for use of a firearm under section 12022.53, subdivisions (b) and (e)(1). As with count 1, the court stayed sentence on a section 186.22 gang enhancement under section 12022.53, subdivision (f).<sup>16</sup> On count 6 (robbery), the court sentenced Wildman to one year consecutive to count 1, plus a consecutive term of 10 years on the firearm enhancement under section 12022.53, subdivision (b). The court stayed sentence on a section 186.22 gang enhancement under section 12022.53, subdivision (f).<sup>17</sup>

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<sup>16</sup> The court presumably intended to stay sentence on the count 1 and count 5 gang enhancements under subdivision (e)(2) of section 12022.53 rather than subdivision (f). Section 12022.53, subdivision (e)(2) provides: "An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense." Section 12022.53, subdivision (e)(2), authorizes the trial court to impose and stay the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). (*People v. Sinclair* (2008) 166 Cal.App.4th 848, 854.) Subdivision (f) of section 12022.53 addresses multiple enhancement findings "under this section"—i.e., multiple firearm enhancements under section 12022.53.

At Wildman's initial sentencing hearing, the court stated that the sentencing stay on the count 5 gang enhancement was under section 1170.1, subdivisions (f) and (g). At a second hearing to clarify Wildman's sentence, the court stated the stay on that gang enhancement was under section 12022.53, subdivision (f). If this is a point that needs clarification, the parties and trial court can address it on remand and amend the abstract of judgment accordingly.

<sup>17</sup> At Wildman's initial sentencing hearing, the court stated that the sentencing stay on the section 186.22 gang enhancement on count 6 was under section 1170.1, subdivisions (f) and (g).

Under legislation that became effective January 1, 2018, trial courts have discretion whether to impose a firearm sentencing enhancement or to strike or dismiss the enhancement. The legislation amended sections 12022.5, subdivision (c) and 12022.53, subdivision (h) to state that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

As noted, Bolden filed, and Wildman joined in, a petition for rehearing requesting that we remand the matter for the trial court to consider whether to strike the section 12022.53 firearm enhancements, based on this new legislation. At our request, the People filed an answer to Bolden's petition for rehearing and Wildman's joinder. The People do not oppose the petition. Bolden contends and the People agree that the amendment to section 12022.53, subdivision (h), applies retroactively to cases not yet final on appeal. (*In re Estrada* (1965) 63 Cal.2d 740, 746-747; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) The People note that generally points raised for the first time in a petition for rehearing are insufficient bases for granting the petition, but agree with Bolden that "in this limited circumstance this court's consideration of the claim would serve the interests of justice and judicial economy." We agree and, accordingly, remand the matter for the trial court to consider whether to strike or dismiss Bolden's and Wildman's section 12022.53 firearm enhancements under section 12022.53, subdivision (h).



#### IV. ERRORS IN WILDMAN'S ABSTRACTS OF JUDGMENT

In their response to the petition for rehearing, the People request that we direct the trial court to correct certain errors in Wildman's determinate and indeterminate abstracts of judgment. First, the People note that Wildman's indeterminate abstract incorrectly specifies the sentencing enhancement imposed on count 1 as being 25 years to life under "PC 186.22(B)(1)(C)." In accordance with our detailed recounting of Wildman's sentence above, the abstract should be corrected to show that the 25 years to life enhancement on count 1 was imposed under section 12022.53, subdivisions (d) and (e)(1), and that the enhancement under section 186.22, subdivision (b)(1)(C) was stayed. We further note that Wildman's indeterminate abstract does not specify the sentence imposed on the murder conviction.

Second, the People contend that Wildman's determinate abstract of judgment incorrectly states that on count 5 (robbery), a firearm enhancement was imposed and a gang enhancement was stayed. The People submit that the abstract should reflect that the court imposed a gang enhancement sentence on count 5 and stayed sentence on the gang enhancement, as the abstract reflects for count 6. The People are mistaken. The determinate abstract of judgment for Wildman is correct as to count 5 and incorrect as to count 6.

At the sentencing hearing the prosecutor asked the court to sentence Wildman on count 5 to five years for the robbery plus a consecutive term of "10 years for a violation of Penal Code section 12022.53(b), with the gang allegation, 186.22(b)(1)(c), the ten years being stayed on that [enhancement]." The prosecutor also asked the court to impose

a 10-year firearm enhancement under section 12022.53, subdivision (b), on count 6 and stay a 10-year gang enhancement under section 186.22 on count 6. The court's oral pronouncement of sentence on both counts 5 and 6 "imposed" a 10-year enhancement under section 12022.53, subdivision (b), and "stayed" a 10 year enhancement under section 186.22, subdivision (b)(1)(C).

Five days later, the court held a second hearing to clarify Wildman's sentencing. At that hearing, the court again orally pronounced that on count 5 and count 6, it was imposing a consecutive 10-year enhancement under section 12022.53, subdivision (b), and staying a 10-year enhancement under section 186.22, subdivision (b)(1)(C). The court stated, regarding count 5, that "for a violation of [section] 12022.53(b), (e)(1), the Court will sentence the defendant consecutive ten years; and pursuant to [section] 186.22(b)(1)(C), that will be stayed. It will have to be pursuant to [section] 12022.53(f)." Similarly, as to count 6, the court stated that "consecutive to [the one-year term on count 6] is ten years, for a violation of Penal Code Section 12022.53(b), (e)(1), and ten years for a violation of PC 186.22(b)(1)(C), which will be stayed pursuant to [section] 12022.53(f)."

Thus, the abstract of judgment correctly reflects imposition of a firearm enhancement and stay of a gang enhancement on count 5, but incorrectly reflects the opposite on count 6. The abstract should be corrected to reflect imposition of the firearm enhancement under section 12022.53, subdivisions (b) and (e)(1) on count 6, and stay of the gang enhancement under section 186.22, subdivision (b)(1)(C) on count 6. However, if the court intended to stay the firearm enhancement and impose the gang enhancement

on counts 5 and 6, or the People believe that would have been the appropriate course, the issue may be raised on remand for resentencing.

#### DISPOSITION

Defendant Bolden's and defendant Wildman's sentences are vacated and the matter is remanded to the trial court for resentencing. The court is directed to exercise its discretion under section 12022.53, subdivision (h), and determine whether it should strike or dismiss the firearm enhancements otherwise required to be imposed under section 12022.53, and if appropriate following exercise of that discretion, to resentence defendants and amend their abstracts of judgment accordingly. The court is further directed to correct the errors in defendant Wildman's abstracts of judgment noted in this opinion. Following resentencing, the court shall forward amended and corrected abstracts of judgment to the appropriate authorities. In all other respects, the judgments are affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.